# Petition

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No.

# In the Supreme Court of the United States

October Term 1983

JOSEPH MAGNIN COMPANY, INC.,
*Petitioner,*

vs.

NATIONAL LABOR RELATIONS BOARD and DEPARTMENT STORE EMPLOYEES UNION, LOCAL 1100, UNITED FOOD & COMMERCIAL WORKERS INTERNATIONAL UNION, AFL-CIO,
*Respondents.*

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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## QUESTIONS PRESENTED

1. Whether the opinion of the Ninth Circuit Court of Appeals is in conflict with applicable decisions of this Court upholding the national labor policy favoring the settling of labor disputes by arbitration.

2. Whether the opinion of the Ninth Circuit Court of Appeals conflicts in principle with the Third Circuit Court of Appeals' application of the "clearly repugnant to the purpose and policies of the Act" criterion.

3. Whether the Ninth Circuit Court of Appeals improperly affirmed the Order of the National Labor Relations Board, as the Board did not state a reasoned, proper basis for its refusal to defer to an arbitration award.

4. Whether the Ninth Circuit Court of Appeals improperly affirmed the Board's Order by judging the propriety of the Order on grounds which were not invoked by the Board.

## PARENT COMPANY AND SUBSIDIARIES

Joseph Magnin Company, Inc.
New Magnin, Inc. - parent company

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No.

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vs.

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*Respondents.*

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioner Joseph Magnin Company, Inc. ("the Company" or "the Petitioner") petitions for a writ of certiorari to review the 2-1 decision of the United States Court of Appeals for the Ninth Circuit, enforcing an order of Respondent National Labor Relations Board ("the NLRB", "the Board", or "the Respondent"). In the Board's order, the NLRB declined to defer to an arbitrator's decision and award, after acknowledging the validity of the decision itself.

In his decision and award, the arbitrator found that Petitioner had violated certain sections of the NLRA and he imposed a remedy. The NLRB accepted the analysis, findings and conclusions of the arbitrator, but failed to defer to his award.

Petitioner claims error only as to the Ninth Circuit's affirmation of the Board's repudiation of the arbitration award. No error is claimed in the Ninth Circuit's affirmation of the Board's confirmation of the arbitrator's decision.

## OPINIONS BELOW

The opinion of the Ninth Circuit, filed on May 3, 1983, is reported at 704 F.2d 1457 (1983). It is reproduced *infra*, in Appendix "A" ("App. A") at pp. A1-A13. The Ninth Circuit denied Petitioner's petiton for rehearing, and suggestion for rehearing *en banc*, by order of the Court of Appeals filed on July 27, 1983. That order is not reported. It is reproduced *infra* (App. "B", p. B1).

The order of the Board, which was enforced by the Court below, is reported at 257 N.L.R.B. 656 (1981). It is reproduced *infra* (App. "C", pp. C1-C7). Attached to the order is the Administrative Law Judge's decision (App. "C", pp. C8-C34). Petitioner's motion for reconsideration was denied by the Board on September 18, 1981. It is reproduced *infra* (App. "D", p. D1).

The decision of Arbitrator Grodin, which was not deferred to by the Board, is reproduced *infra* (App. "E", pp. E1-E36).

## JURISDICTION

The opinion (App. "A") of the Court of Appeals was filed on May 3, 1983. On July 27, 1983, the Court of Appeals issued an order (App. "B") denying the Company's petition for rehearing and suggestion for rehearing *en banc*. This Court has jurisdiction under 28 U.S.C. § 1254(1).

## STATUTES INVOLVED

Sections 201(b), 203(d) and 301(a) of the Labor-Management Relations Act, 29 U.S.C. sections 171(b), 173(d) and 185(a), and section 10(a) of the National Labor Relations Act ("the NLRA"), 29 U.S.C. section 160(a), are set forth at App. F, *infra*, pp. F1-F2.

## STATEMENT OF THE CASE

A charge was filed against Petitioner, Joseph Magnin Company, Inc., a California corporation, on January 10, 1979 by Department Store Employees Union, Local 1100, United Food & Commercial Workers International Union, AFL-CIO (hereinafter referred to as the "Union"). The Company had opened a new freestanding Gucci Shop on Post Street in San Francisco in late 1978. The charge alleged that the Company had violated section 8(a) (5) of the NLRA by refusing to apply the collective bargaining agreement applicable to the Company's other San Francisco stores to employees at the Post Street Gucci Shop at the time of its opening. An amended charge was filed on November 7, 1979 further alleging that the Company violated section 8(a) (3) of the NLRA by refusing to transfer Union members from existing San Francisco stores to this new location.

Region 20 of the NLRB issued a Complaint and Notice of Hearing in connection with these charges on December 18, 1979. The Company filed an answer denying the Complaint's substantive allegations. Two days of hearing took place before Administrative Law Judge ("ALJ") Martin S. Bennett on August 27 and 28, 1980. At the commencement of the hearing, the Union filed a motion with the ALJ urging him to defer to an arbitration award pursuant to the doctrine articulated in *Spielberg Mfg. Co.*, 112 N.L.R.B. 1080 (1955) regarding the Complaint's section 8(a) (3) allegations. (The Company opposed this motion on the ground that ongoing litigation placed the finality of the arbitration award relied upon by the Union at issue.)

Arbitrator Joseph R. Grodin[1] had issued his extensive opinion and award on July 16, 1979. In that decision, he addressed himself specifically to the unfair labor practice charges which had been filed by the Union covering the dispute in question, and reviewed the statutory law governing the dispute. The collective bargaining agreement between the parties prohibited discrimination on the basis of union membership and thus, by directing himself to that specific point, the

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[1]Now a Justice on the California Supreme Court.

arbitrator addressed the issue of whether there was a violation of section 8(a)(3) of the NLRA. He extensively analyzed NLRB precedent to assure that his interpretation of the agreement would be consistent with statutory standards. He concluded that the contract had been violated, and he imposed a remedy.

The arbitrator reviewed the evidence submitted for the purpose of determining whether complaining employees who were denied transfer opportunities would have earned greater compensation had they been transferred. He concluded that the Union had not presented sufficient back pay evidence upon which to base a back pay remedy. The following portion of Arbitrator Grodin's award is dispositive in this connection:

> The Union suggests that they might be made whole by comparing the average commission of the O'Farrell Gucci salespeople with the Post Street Gucci people, but that comparison fails to support the Union's premise. For example, for the month of March 1979, 15 employees at the Post Street earned a total of $5,602 in commissions, for an average of $373 per employee while seven employees at the O'Farrell boutique earned $2,687 in commissions for an average of $384 per employee. The Post Street employees worked a total of 2,190 hours during that month, earning commissions at the rate of approximately $2.50 per hour while O'Farrell Street employees worked a total of 802 hours, earning commissions at the rate of approximately $3.30 per hour. The Union in its brief suggest that because the Post Street store has been packed with an excessive number of nonunion employees, resulting in low average commissions, the figures should be adjusted. No evidence is provided or suggested however, that would enable such an adjustment to be made. Accordingly, this requested relief is denied.

App. E. pp. E33.

The ALJ rendered his decision in this matter on December 16, 1980. The ALJ did not clearly rule upon the Union's motion to defer in his decision. He did find the arbitrator's

award entitled to "great weight" and further found the award to comply with the Board's deferral standards articulated in *Spielberg Mfg. Co.*, 112 N.L.R.B. at 1082. After making these findings, as well as further findings of fact, the ALJ concluded that the Company had violated section 8(a)(3) of the NLRA and recommended that the Company "be ordered to offer immediate transfer to those employees who would have transferred but for the unlawful discrimination, as determined in compliance." The ALJ further concluded that the section 8(a)(5) allegations of the Complaint were not proven.

All parties filed timely exceptions to the ALJ's decision and the Board issued its Decision and Order in this matter thereafter. In its award, the Board upheld the arbitrator's and ALJ's determination that the Company had violated section 8(a)(3) of the Act (but had not violated section 8(a)(5)). However, the Board expressly refused to defer to Arbitrator Grodin's award. The Board stated that its decision to not defer to Arbitrator Grodin's award was based on the fact that "arbitrator Grodin was not presented with sufficient evidence by the parties and therefore was unable to make findings of fact crucial to shaping the necessary remedy with regard to back pay for the employees denied transfers by Respondent. *See Triple A Machine Shop, Inc.*, 245 N.L.R.B. No. 24 (1979)." App. C, p. C-1. The Board proceeded to direct a back pay remedy for the section 8(a)(3) violation which was considered by Arbitrator Grodin but expressly rejected by him on the ground that the Union had not presented sufficient evidence upon which findings of fact crucial to shape the requested back pay remedy could be made.[2] In the instant case there was no contention that the decision of the arbitrator was tainted by fraud, collusion, unfairness, serious procedural irregularities, or that the back pay evidence was unavailable through fault of the arbitrator or the Company.

The Company filed a motion for reconsideration with the NLRB urging the Board to reconsider its decision and order.

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[2]The Board's decision also departed from the arbitrator's award by applying the backpay remedy to not only the seven employees for whom the Union sought relief in the arbitration, but also anyone else who was supposedly discouraged from applying for transfer.

The Company's motion was denied by the NLRB on September 18, 1981.

This case came before the Ninth Circuit Court of Appeals upon the petition of the NLRB for enforcement of an order of the Board reported at 257 N.L.R.B. No. 86. On May 3, 1983 the Ninth Circuit, in a 2-1 decision, granted the NLRB's application for enforcement of its order. In its opinion below, the Ninth Circuit explicitly questioned the authority of a reviewing court to interpret the *Spielberg* standards for deferral differently from the NLRB, and, citing the third prong of the doctrine, "clearly repugnant to the purpose and policies of the Act", affirmed the Board's order. App. A, p. A-5. In footnote 2 of the Circuit's decision, the court reasoned that the Board's

> refusal to defer to the arbitrator's limitation of remedy must logically be based on the Board's longstanding policy of ordering complete relief for proven violations, and the necessary corollary of that policy, that incomplete relief is repugnant to the purposes and policies of the Act. "A fuller statement by the Board of its reasons for this conclusion would, as [the dissent] states, have been helpful. We cannot say, however, that its refusal to defer on the ground of repugnance to the Act was, on the record before the ALJ, an abuse of discretion." *NLRB v. Max Factor*, 640 F.2d at 202 (citations omitted).

App. A. p. A-9.

Judge Wallace dissented from that part of the majority opinion upholding the Board's refusal to defer to the arbitrator's denial of back pay to the seven union employees. In that dissent (App. A, pp. A-10-A-13), Judge Wallace expalined that the Board's "proffered reasoning" for its refusal to defer was not encompassed by any of the Board's deferral standards, nor had the "Board explained its departure from its previously announced rules." App. A, p. A-11.

In refusing to defer, Judge Wallace explained that the Board's decision "contradicts the policy behind its deferral standards, which is to favor voluntary settlement of labor disputes through arbitration." App. A, p. A-12. Judge Wallace explained that contrary to the general rule in arbitration

proceedings, the Board's decision placed the burden of developing necessary evidence to substantiate positions on the arbitrator, rather than on the party that makes the allegation. The dissent noted that the Board had not cited a case, nor given any reason for endorsing the shift. It dismissed the Board's brief's argument that the Board's order was based on the third prong of *Spielberg*, reasoning that as this argument was not contained in the Board's published order, it could not be submitted as the basis for the Board's decision.

The Ninth Circuit denied Petitioner's petition for rehearing, and suggestion for rehearing *en banc*, by order of the Court of Appeals filed on July 27, 1983.

Subject matter jurisdiction was conferred upon the circuit court by section 10(a) of the National Labor Relations Act, as amended (29 U.S.C. section 151 *et seq.*), and rule 15(b) of the Federal Rules of Appellate Procedure, upon the Petition for review of an order of the Board issued on August 10, 1981. The Ninth Circuit had personal jurisdiction over Joseph Magnin Company, Inc., inasmuch as the Company transacts business in San Francisco, California and other portions of the Ninth Circuit.

## REASONS FOR GRANTING THE WRIT

### I

### THE OPINION OF THE NINTH CIRCUIT COURT OF APPEALS IS IN CONFLICT WITH THE NATIONAL LABOR POLICY FAVORING THE SETTLING OF LABOR DISPUTES BY ARBITRATION

The cornerstone of national labor policy in the United States is the unified federal interest in the promotion of industrial stabilization. The settling of labor disputes by arbitration has laid the foundation which supports this stabilization, as arbitration has become "the substitute for industrial strife,"[3] and the congressionally preferred machinery for the resolution of labor disputes.[4]

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[3] *United Steelworkers of Am. v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 580 (1960).

[4] 29 U.S.C. § 173(d).

Arbitration, as an effective substitute for industrial strife, derives its strength from its final and binding nature. The finality of arbitration awards: (1) eliminates the danger that a party to the award would be exposed to a multiplicity of rulings; (2) affords the courts and Board a welcome decrease in their case load, while assuring the participants a speedier, less confrontational resolution of their dispute; and (3) most importantly, promotes industrial peace by binding the parties to the result of a proceeding the parties themselves voluntarily submitted should bind them.

Congress, the Board and this Court have taken steps to ensure the finality of arbitration's labors. In 1947, Congress enacted the Labor-Management Relations Act, which provides in section 301 for court enforcement of any contractual agreement between an employer and a labor union, and in section 203(d), in pertinent part:

> Final adjustment by a method agreed upon by the parties is declared to be the desirable method for settlement of grievance disputes arising over the application or interpretation of an existing collective bargaining agreement.

29 U.S.C. § 173(d).

In 1955, in *Spielberg Mfg. Co.*, 112 N.L.R.B. 1080 (1965), the Board espoused the "*Spielberg* doctrine," an adoption of the Board's guiding principle that "the Board has considerable discretion to respect an arbitration award and decline to exercise its authority over alleged unfair labor practices if to do so will serve the fundamental aims of the Act." *International Harvester Co.*, 138 N.L.R.B. 923, 925-26 (1962), *enforced sub nom., Ramsey v. NLRB*, 327 F.2d 784 (7th Cir. 1964), *cert. denied*, 377 U.S. 1003 (1964). Under *Spielberg* and its progeny, when faced with the decision of an arbitral tribunal in which all parties have agreed to be bound by the proceedings:

> *[t]he Board should give hospitable acceptance to the arbitral process as 'part and parcel of the collective bargaining process itself,' [and] involuntarily withhold its undoubted authority to adjudicate alleged unfair labor practice charges involving the same subject matter, unless it clearly appears that*

> the arbitration proceedings were tainted by fraud, collusion, unfairness or serious procedural irregularities or that *the award was clearly repugnant to the purposes and policies of the Act.*

*Id.* at 926-927 (emphasis added).

In *Spielberg Manufacturing Co.*, the Board set forth specific criteria for deferral to arbitration awards. In that case, as part of a strike settlement, the parties agreed to arbitrate the employer's decision to not reinstate four strikers who were accused of picket-line misconduct. The Board decided to defer to the decision of the arbitration panel which denied reinstatement, rather than hear the unfair labor practice charge filed. In so doing, the Board promulgated a three-pronged test for determining when deferral is appropriate. The Board would defer to the arbitration decision where: (1) the proceedings were "fair and regular"; (2) all parties "agreed to be bound"; and (3) the decision was not "clearly repugnant to the purpose and policies of the Act."[5] *Spielberg Mfg. Co.*, 112 N.L.R.B. at 1082.

In *Carey v. Westinghouse Elec. Corp.*, 375 U.S. 261, 271 (1964), this Court gave the *Spielberg* doctrine its commendation, quoting with approval the lower court's clear affirmance of the Board's position in *Spielberg*:

> The Act, as has repeatedly been stated, is primarily designed to promote industrial peace and stability by encouraging the practice and procedure of collective bargaining. Experience has demonstrated that collective bargaining agreements that provide for a *final and binding* arbitration of grievance and disputes arising thereunder, 'as a substitute for industrial strife,' contribute significantly to the attainment of the statutory objectives.

*Id.* at 271 (quoting from *International Harvester*, 138 N.L.R.B. at 926); emphasis added.

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[5]The Board has since added a fourth criterion: that the issue presented in the unfair labor practice case was presented to and considered by the arbitrator. *Raytheon Co.*, 140 N.L.R.B. 883 (1963), *set aside on other grounds*, 326 F.2d 471 (1st Cir. 1964).

In the instant case, the Ninth Circuit has applied the *Spielberg* doctrine in marked contrast to this Court's preference for arbitration as a means of settling labor disputes. The Ninth Circuit has interpreted the third prong of the *Spielberg* doctrine to encompass, as clearly repugnant to the Act, an arbitration award which does not go as far as the Board would have gone had the case been decided by it. App. "E", p. E-33. In short, the Ninth Circuit's interpretation leaves unsettled every arbitration decision in which a remedial request is denied, not on legal grounds, but on the ground that the arbitrator has not been presented sufficient evidence, by the party seeking the remedy. This gives a party who has agreed to be bound by arbitration "two bites at the apple." The arbitrator's decision lacks finality. A party who inadequately prepares for arbitration is rewarded by a *de novo* review: both the decision and new evidence is reviewed at the Board level.

The Ninth Circuit's decision is erroneous in both law and reason. Beyond frustrating an important national policy, the Circuit's decision cannot be placed within the line of cases finding an arbitral award "clearly repugnant to the purposes and policies of the Act." *Spielberg Mfg. Co.*, 112 N.L.R.B. at 1082. The few situations where an arbitrator's award has been vacated under the clearly repugnant to the Act criterion have been rigorously limited to only certain restricted instances, e.g., where the arbitration award authorized the company to violate state law (*Banyard v. NLRB*, 505 F.2d 342 (D.C. Cir. 1974)) or the award conditioned the backpay award on surrender of an unfair labor practice charge before the Board by the discharged employee (*Douglas Aircraft Co. v. NLRB*, 609 F.2d 352 (9th Cir. 1979)). The Ninth Circuit improperly concluded that the instant case was an example of an award that was clearly repugnant to the Act.

Reason does not lose force to precedent in setting aside the Ninth Circuit's decision in this case. Upholding the arbitrator's award of less than full relief, i.e., transfer rights without backpay, when backpay evidence is unavailable to the arbitrator, is not out of step with previous Supreme Court decisions in which the Court has underlined the need for arbitral judgment and arbitral flexibility in formulating remedies in diverse and often unforeseen contingencies. *United Steelworkers of Am. v.*

*Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960). In fact, courts have upheld an arbitrator's issuance of unusual and indeed drastic remedies of the kind the Board would not order with respect to unfair labor practice charges (*see e.g., Joint Bd., ILGWU v. Senco, Inc.*, 289 F. Supp. 513 (D. Mass 1968) and *United Steelworkers of An.. v. United States Gypsum Co.*, 492 F.2d 713 (5th Cir. 1974), *cert. denied*, 419 U.S. 998 (1974)), and, which would be beyond the power of the Board to issue.

Today, approximately 96 percent of all collective bargaining agreements contain procedures for settlement of disputes through mutual discussion and arbitration. *Basic Patterns in Union Contracts*, 6 (B.N.A. Books 1974). The Ninth Circuit's failure in this case to uphold the finality of an arbitration award where the arbitrator faced a defective remedial request makes the arbitration process a less appealing alternative for both the employer and union. The simple dispositive force of its view leaves both parties to an arbitration facing the possibility of a subsequent hearing on additional factual information not present at the hearing; an uncertainty is created which may drive both parties to the adversary setting adjudicating their disputes, rather than into the conciliatory setting of arbitration provided for in their collective bargaining agreement. The Court is disposed to grant certiorari petitions where an important federal interest is at stake. To do otherwise in this case would undermine the arbitration process and consequently jeopardize one of the Act's principal purposes: the promotion of industrial stabilization.

## II

## THE OPINION OF THE NINTH CIRCUIT COURT OF APPEALS IS IN CONFLICT IN PRINCIPLE WITH THE THIRD CIRCUIT COURT OF APPEALS' APPLICATION OF THE "CLEARLY REPUGNANT TO THE ACT" CRITERION

There is disagreement between the Ninth Circuit and Third Circuit over the nature of what is "clearly repugnant to the Act." This conflict impairs uniformity of treatment on review of arbitration decisions, in an area of federal law in which

uniformity is important to safeguard the underlying federal interest.

In its opinion below, the Ninth Circuit explicitly questions the authority of the reviewing court to interpret the criterion for deferral differently from the Board, citing its decision in *NLRB v. Max Factor & Co.*, 640 F.2d 197, 204 (9th Cir. 1980), *cert. denied*, 451 U.S. 983 (1981). In that case the Ninth Circuit elaborated upon its application of its "repugnancy to the Act" standards. There the Ninth Circuit explained that the Board need not defer to an arbitration's result when that result differs from one which it finds appropriate under the Act, "if it finds that the interest in affording the Act's protection is so compelling under the circumstances that it outweighs the interests in encouraging private resolution of disputes through arbitration." *Id.* at 204 (footnote omitted).

This application of the repugnancy to the Act criterion does not afford a meaningful review of the Board's application of the criterion, and is not in concert with the Board's and the Court's labors in establishing a federal labor policy which strongly favors peaceful resolutions of disputes through private arbitration. Indeed, under the Ninth Circuit's application of the repugnancy to the Act criterion, parties are motivated to appeal every unfavorable arbitration decision to the Board in case the Board might view the decision as repugnant to the purposes and policies of the Act. If the Board so finds, its decision is not subjected to a meaningful review at the Ninth Circuit. The more rigorous review standards applied by the Third Circuit Court of Appeals would not allow for this travesty.

Under the standard enunciated by the Third Circuit, the clearly repugnant to the Act criterion does not call for a weighing of national labor policies. Rather, the Third Circuit explains that the national labor policy favoring labor arbitration outweighs the need for uniformity in the resolution of every case. As such, the Circuit concluded in *NLRB v. Pincus Bros., Inc. - Maxwell*, 620 F.2d 367 (3d Cir. 1980), that in refusing to defer to an arbitration award finding an employee terminated for cause for distributing leaflets when the employee's leafletting was arguably unprotected activity, the Board had abused its discretion. The Third Circuit explicitly found that the arbitration

award was *not* clearly repugnant to Act though the arbitral result was "only arguably correct and . . . would be decided differently in a trial *de novo*." *Id.* at 374. Thus, failure on the part of the arbitrator to render a decision which the Board itself would have rendered was not fatal to the arbitrator's decision, as the Court found no need to overturn an arbitration decision merely because the decision was only arguably consistent with the Act.

If this more rigorous standard had been applied in the instant case, it is manifest that arbitrator Grodin's award would have been enforced. The arbitrator found a violation of the Act and sought to shape a remedy. It was foreclosed from shaping a remedy which included any backpay computation because of the lack of the Union's submission of backpay evidence. This evidence was necessary in order to shape a backpay award. Thus, the arbitrator was forced to provide a remedy which included only transfer rights. By paying homage to its overly deferential standards of review under the repugnancy to the Act criterion, the Ninth Circuit necessarily overlooked the propriety of the arbitrator's award.

It is axiomatic that the Ninth Circuit's interpretation of the repugnancy to the Act criterion runs counter to the well-established federal labor policy which strongly favors the peaceful resolution of disputes through private arbitration. The exercise of this Court's supervisory authority is necessary here so that arbitration decisions within the Ninth Circuit receive the same degree of finality afforded those in the Third Circuit, and arbitration does not become "nothing more than a costly extra step in the march to federal court rather than the cost efficient and rapid resolution of disputes it was designed to be." *NLRB v. Motor Convoy, Inc.*, 673 F.2d 734, 736-739 (4th Cir. 1982).

## III

## THE NINTH CIRCUIT COURT OF APPEALS IMPROPERLY AFFIRMED THE BOARD'S ORDER, AS IT WAS AN ABUSE OF DISCRETION FOR THE BOARD TO NOT STATE A REASONED, PROPER BASIS FOR ITS REFUSAL TO DEFER TO THE ARBITRATION AWARD

The Board erred, in that it failed to provide a reasoned, proper explanation for its decision based on the *Spielberg* standards for deferral, or, at the very least, an explanation for its decision to change its interpretation of the *Spielberg* standards. The error is subject to review by this Court, for, if this court refuses to hear it, the Ninth Circuit's erroneous judicial stamp of approval of the Board decision is left untarnished, and an administrative agency's decision which lacks the fundamental requirement of a proper reasoned basis will stand, contrary to decisions of this court. *See, e.g., SEC v. Chenery Corp.*, 332 U.S. 194, 196-97 (1947).

In its decision below (App. C), the Board determined that the arbitrator decided the case under circumstances in which insufficient evidence was presented by the parties to make a finding of fact crucial to a backpay award, and, citing *Triple A Machine Shop, Inc.*, 245 N.L.R.B. 136 (1979), overturned the arbitrator's award. In *Triple A Machine Shop, Inc.*, 245 N.L.R.B. at 136, a Board panel majority decided that deferral to the arbitrator's award was inappropriate where the proceedings were not fair and regular, noting that the arbitrator: did not consider the statutory issue before him, failed to make necessary credibility and factual findings and, in lieu of making the findings, decided to issue "compromise" awards. The Board has consistently cited *Triple A Machine Shop, Inc.*, 245 N.L.R.B. at 136, for the principle that the Board will not defer to: (1) "a compromise award" (*Stop-N-Shop Companies, Inc.*, 259 N.L.R.B. 867 (1981); or, (2) an award which fails to address a pertinent unfair labor practice issue. *See, e.g. B&L Motor Freight, Inc.*, 253 N.L.R.B. 115 (1980). Neither principle is applicable to the facts of this case, and, furthermore, the Board did not attempt to explain their application.

The practical effect of the Board's ill-reasoned and unfounded decision left the Ninth Circuit to speculate that the Board's refusal to defer was based on a corollary to the Board's policy of ordering complete relief for proven violations. This basis can be found nowhere in the Board's decision, nor can it logically be accepted as an extension of the principle of *Triple A Machine Shop, Inc.*, the case the Board cited in refusing to defer. The Ninth Circuit itself admits that "a fuller statement by the Board of its reasons for this conclusion would, as (the dissent) states, have been helpful." 704 F.2d 1457, 1561 n.2. It would not only have been helpful, it was required, and in not doing so, the Board abused its discretion. As this Court has often stated, the burden to state the reason upon which an administrative agency's decision is based lies with the agency, not with the courts:

> It will not do for a court to be compelled to guess at the theory underlying the agency's action; nor can a court be expected to chisel that which must be precise from what the agency has left vague and indecisive. In other words, 'We must know what a decision means before the duty becomes ours to say whether it is right or wrong.' *United States v. Chicago, M.St.P.& P.R. Co.*, 294 U.S. 499, 511, 79 L. Ed. 1023, 1032, 55 S.Ct. 462.

*SEC v. Chenery Corp.*, 332 U.S. 194, 196-97 (1947).

The requirement of a well-reasoned decision is intended to facilitate judicial review. To allow the Board's decision below to remain denies the judicial system meaningful oversight of the decisions of an administrative agency. This oversight is necessary because it discourages arbitrary capricious actions by demanding a rational and considered decision, or the enunciation of a new agency standard if indeed the agency has deviated from its stated standard. Additionally, upholding the Board's actions here leaves aggrieved persons uninformed of the grounds underlying the administrative actions taken with respect to them.

## IV

## THE NINTH CIRCUIT IMPROPERLY AFFIRMED THE BOARD'S ORDER BY JUDGING THE PROPRIETY OF THE ORDER ON GROUNDS WHICH WERE NOT INVOKED BY THE BOARD

Contrary to decisions of this Court, the Ninth Circuit has inserted, as sole support for its decision to uphold the Board's order, a basis the Board itself did not rely on its order. The Ninth Circuit's decision is contrary to the Supreme Court's decision in *SEC v. Chenery Corporation*, 318 U.S. 80, 88 (1943), which has repeated that:

> [f]or purposes of affirming no less than reversing its orders, an appellate court cannot intrude upon the domain which Congress has exclusively entrusted to an administrative agency.

The exercise of this Court's power of supervision is necessary to rectify the Ninth Circuit's departure from the usual and accepted course of review of a determination of an administrative agency. The Supreme Court has often recognized that such a departure is:

> . . . incompatible with the orderly functioning of the process of judicial review.' This is not to depreciate, but to vindicate . . . the administrative process . . .

*Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 169 (1962).

The Board cited, as the sole basis for its refusal to defer to the arbitrator's remedy that "arbitrator Grodin was not presented with sufficient evidence by the parties and therefore was unable to make findings of fact crucial to shaping the necessary remedy with regard to backpay for the employees denied transfers by Respondent. *See Triple A Machine Shop, Inc.*, 245 N.L.R.B. No. 24 (1979)." *Joseph Magnin Co., Inc.*, at 656 n.1. Notwithstanding the principle for which this case stands (*supra*, at p. 19), the Ninth Circuit relies upon the third prong of *Spielberg* in affirming the Board's decision not to defer to the arbitral award, not because the arbitrator had entered a compromise award, or an award which failed to pass upon the

unfair labor practice issue, but because the arbitrator had rendered an award allegedly repugnant to the Act. As the dissent to the Ninth Circuit's decision stated:

> the Board's analysis may be a plausible interpretation of the third prong of *Spielberg*, or provide sufficient explanation for the Board's departure from its traditional standards in this case. Unfortunately, this reasoning, which is barely touched upon in its [the Board's] brief, is not contained at all in the Board's published order.

*Id.* at 1465. Clearly, the Board meant, and those cases citing *Tripie A Machine Shop, Inc.* illustrate, that the decision in *Triple A Machine Shop, Inc.* was based on the finding that the arbitration decision was not "fair and regular," a finding which is inapplicable to this case. As the dissent pointed out in the decision below:

> it is axiomatic that 'the grounds upon which an administrative order must be judged are those upon which the record discloses that its action was based.' *Securities and Exchange Commission v. Chenery Corp.*, 318 U.S. 80, 87, 63 S. Ct. 454, 459, 87 L. Ed. 626 (1943); *FTC v. Barry & Hutchinson Co.*, 405 U.S. 233, 249-50, 92 S. Ct. 898, 907-08, 31 L. Ed. 2d 170 (1972); *Bob's Big Boy Family Restaurants v. NLRB, supra*, 625 F.2d at 854. (We are not permitted to 'substitute a different rationale provided by the Board.')

*Id.* at 1465. Thus, it was error for the Ninth Circuit to insert its reasoning for the Board's in this case.

Additionally, attempts by the Board's counsel in its brief before the Ninth Circuit to justify the Board's refusal to defer on the basis that the award was repugnant to the policies of the act have no effect: Counsel's post hoc rationalizations have never been accepted by this Court, and it would be outside the usual course of judicial proceedings for a Court of Appeals to do so. Thus, in this case, where the Court does not rely on the Board's stated basis for its decision, but either possibly on the Board's counsel's post hoc rationalizations, or its own, this Court should grant certiorari to correct the Court of Appeal's error. *See, e.g., NLRB v. Metropolitan Life Ins. Co.*, 380 U.S. 438, 442-443 (1965).

## CONCLUSION

For the foregoing reasons, this Petition for Writ of Certiorari should be granted.

DATED: October 24, 1983.

Respectfully submitted,

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# APPENDIX

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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

| | |
|---|---|
| NATIONAL LABOR RELATIONS BOARD, *Appellee,* | No. 82-7165 |
| *v.* | OPINION |
| JOSEPH MAGNIN COMPANY, *Appellant.* | [Filed May 3, 1983] |

On Application For Enforcement Of An Order
Of The National Labor Relations Board
Argued And Submitted December 14, 1982

Before: WALLACE and FERGUSON, Circuit Judges, and GRANT,* District Judge

FERGUSON, Circuit Judge:

The National Labor Relations Board petitions for enforcement of its order finding the Joseph Magnin Company in violation of sections 8 (a) (3) and (1) of the National Labor Relations Act, 29 U.S.C. § 158 (a) (1), (3), and ordering that affected employees be made whole. We enforce the Board's order.

**FACTS**

Joseph Magnin Company, Inc., operates retail stores in California and other western states. It currently has seven locations within San Francisco, including its O'Farrell Street store (Store No. 1). Prior to 1977 the company had voluntarily

*Hon. Robert A. Grant, Senior United States District Judge, Northern District of Indiana, sitting by designation.

extended recognition to Department Store Employees Local 1100 and extended the collective bargaining agreement to each of its newly opened stores in San Francisco. However, its locations outside the city remained unorganized. In 1977 Magnin opened the Embarcadero store in San Francisco without extending recognition.

The company has a policy, which first appeared in written form in 1977, of not transferring hourly employees between locations, with exceptions only for employee relocations or promotions. When the Embarcadero store opened, the company refused to transfer employees from organized locations but did allow some transfers from unorganized locations, claiming that each transfer fell within an exception to its policy. The union filed unfair labor practice charges at that time, which were dismissed for lack of evidence of unlawful motivation. The union later won a representation election at the Embarcadero store.

For some time before 1978, Joseph Magnin had operated Gucci department in Store No. 1 which was devoted exclusively to the products of that designer. In 1978 Magnin entered into an agreement with Gucci to open several separate Gucci shops, one of which was to be on Post Street in San Francisco. The company did not inform its employees of its plans to open the new Gucci shop; rather, it took affirmative steps to conceal its plans from them. After the plans became public, those employees who asked about transfers were told that none would be permitted, and one who attempted to apply was told it would be futile. Employees were told, however, they could resign, thereby losing their accumulated seniority, and then apply for jobs at the new store.

An employee at Store No. 1 filed a grievance in September, 1978. The union requested arbitration and when the company withdrew its participation, procured a state court order to arbitrate. The arbitrator issued an award finding that the company had discriminated against union employees at Store No. 1 on account of their union affiliation, in violation of the collective bargaining agreement, and recommended that employees in the Gucci department at Store No. 1 be allowed to transfer to the new Gucci shop on Post Street.

Meanwhile, the union filed unfair labor practice charges with the NLRB in 1979 and a hearing was held before an administrative law judge (ALJ). The Board, adopting the findings of the ALJ, found that the company had violated sections 8 (a) (3) and (1) by refusing to transfer employees from organized San Francisco locations to the new Gucci shop in order to prevent the union from gaining majority status at the new location. It ordered the company to make whole through transfer "any employees found to have been discriminated against because of union membership either by being denied transfer opportunities or by being discouraged from applying for transfer." 257 N.L.R.B. 656, 658 (1982). Additionally, the Board found that the company's actions had made it impossible to determine whether the union would have represented a majority of the Gucci shop employees at its opening absent the company's unfair labor practices. It therefore found a bargaining order inappropriate, but did order that backpay be computed as if the collective bargaining agreement had been in effect. *Id.* The Board then applied for enforcement, and the company cross-appealed both the determination of violation and the remedy offered.

**ANALYSIS**

I. Unfair Labor Practice.

Section 8 (a) (3) of the Act prohibits an employer from discriminating in its treatment of employees in order to discourage union membership. Section 8 (a) (1) prohibits employer interference with employees' rights to organize and bargain collectively; a violation of 8 (a) (1) may be predicated on an 8 (a) (3) violation.[1] The Board's determination that Joseph Magnin refused to transfer organized employees in order to avoid organization of its Gucci shop must be upheld if supported by substantial evidence on the record as a whole. *NLRB v. Brooks Camera, Inc.*, 691 F.2d 912, 915 (9th Cir. 1982); *NLRB v. Anchorage Times Publishing Co.*, 637 F.2d 1359, 1363 (9th Cir.), *cert. denied*, 454 U.S. 835 (1981).

Our review of the record convinces us that the Board's determination is well supported. Although the Board considered evidence concerning prior events surrounding the opening of

the Embarcadero store as "background," the evidence of a violation drawn solely from the company's actions concerning the Gucci shop opening is "reasonably substantial in its own right." *NLRB v. MacMillan Ring-Free Oil Co.*, 394 F.2d 26, 33 (9th Cir.) *cert. denied*, 393 U.S. 914 (1968). While events occuring more than six months before filing may not be used as the basis of a charge, 29 U.S.C. § 160 (b), under the circumstances the Board was entitled to consider the Embarcadero store evidence to "shed light on the true character of matters occuring within the limitaitons period." *Local Lodge No. 1424, I.A.M. v. NLRB*, 362 U.S. 411, 416 (1960); *NLRB v. MacMillan Ring-Free Oil Co.*, 394 F.2d at 33.

The Board determined that Joseph Magnin's refusal to transfer employees to the Gucci shop was based on its desire to avoid unionization of that shop rather than on any neutral policy. In analyzing motivation, the Board must rely on circumstantial as well as direct evidence, and "is to be accorded special deference in drawing derivative inferences from the evidence." *NLRB v. Tischler*, 615 F.2d 509, 511 (9th Cir. 1980). The Board had before it ample evidence of the company's desire to open the Gucci shop non-union. Additionally, the ALJ specifically found that the company refused to consider transferring employees from Store No. 1 even when such transfers would have fallen within the company's stated exceptions to its policy. The Board's inference of unlawful motivation is thus reasonable and must be accepted. *NLRB v. Miller Redwood Co.*, 407 F.2d 1366, 1369 (9th Cir. 1969).

II. Deferral to Arbitration.

Joseph Magnin contends that the Board erred in refusing to defer to the arbitrator's award, which found that the company had discriminated against union members, but failed to make any backpay award. The Board has wide discretion in determining whether or not to defer to an arbitrator's award, and only abuses that discretion if "it fails to follow its own deferral standards or if the standards themselves are invalid." *Ad Art, Inc. v. NLRB*, 645 F.2d 669, 675 (9th Cir. 1980). In *Spielberg Mfg. Co.*, 112 N.L.R.B. 1080 (1955), the Board announced that it would defer to an arbitration proceeding if (1) the proceedings appear to have been fair and regular; (2) all parties agree to be bound;

and (3) the arbitrator's decision is not repugant to the purpose and policies of the Act. These criteria were approved by the Supreme Court in *Carey v. Westinghouse Electric Corp.*, 375 U.S. 261 (1964). The Board will, however, refuse to defer "unless the unfair labor practice issue before the Board was both presented to and considered by the arbitrator." *Suburban Motor Freight, Inc.*, 247 N.L.R.B. No. 2 (1980), *quoted in Ad Art, Inc. v. NLRB*, 645 F.2d at 676.

We note in passing that at the administrative hearing, the company argued that the ALJ should *not* defer to the award. We need not address the significance, if any, of the company's change in position, however, since under the law of this circuit, the Board was entitled to refuse to defer under the third prong of the *Spielberg* test, as glossed by *Suburban Motor Freight*.

The Board found this case inappropriate for deferral based on the ALJ's determination that the arbitrator was not presented with sufficient evidence by the parties and was therefore unable to make findings of fact crucial to shaping the necessary remedy with regard to backpay. This circuit has stated that "[t]he Board has wide discretion to apply its *Spielberg* criteria," *NLRB v. Max Factor & Co.*, 640 F.2d 197, 204 (9th Cir. 1980), *cert. denied*, 451 U.S. 983 (1981), and in fact has questioned the authority of a reviewing court to interpret those criteria differently from the Board. *Id.* at 204 n.7. Thus, the Board is not required to defer to an arbitral award where the arbitrator's inability to make a determination on appropriate relief, in the Board's sound discretion, renders the award repugnant to the purpose and policies of the Act.[2].

III. Make-whole Remedy

Section 10 (c) of the Act empowers the Board, upon finding that unfair labor practice has been committed, to order the violator to cease and desist and "to take such affirmative action . . . as will effectuate the policies of [the] Act." 29 U.S.C. 160 (c). Under this section, "[t]he Board has broad discretion in fashioning remedies to effectuate the policies of the Act in light of the circumstances of each case." *Industrial, Technical & Professional Employees Division, National Maritime Union v. NLRB*, 683 F.2d 305, 308 (9th Cir. 1982); *see also Phelps Dodge Corp. v. NLRB*, 313 U.S. 177, 188, 194 (1941). Its

remedy may not be disturbed "unless it can be shown that the order is a patent attempt to achieve ends other than those which can fairly be said to effectuate the policies of the Act." *Virginia Electric & Power Co. v. NLRB*, 319 U.S. 533, 540 (1943).

A. The Transfer Order.

The Board ordered that the Company, *inter alia*:

> (b) Immediately transfer to its Gucci store at 253 Post Street, San Francisco, California, any employees found to have been discriminated against because of union membership either by being denied transfer opportunities or by being discouraged from applying for transfer, discharging if necessary any employees now filling the positions to which the discriminatees are to be transferred. . . .

The literal terms of the order thus appear to give transfer rights to those employees who were discouraged from applying for transfers but who would not have been granted transfer even absent any company misconduct. However, the order must be read in light of the fact that the determination of which employees must be transferred has been deferred until later compliance hearings. At those hearings the company must have the opportunity to show that it would have refused to transfer a particular employee in the absence of unlawful motivation. This approach is consistent with that taken in *Wright Line, A Division of Wright Line, Inc.*, 251 N.R.L.B. 1083 (1980), *enf'd*, 662 F.2d 899 (1st Cir. 1981).

If, during the compliance hearings, it appears that there are an insufficient number of appropriate positions at the Gucci shop for potential transferees, a method of prioritizing may be adopted by negotiation of the parties or determination of the Board. As this circuit stated when faced with a similar question:

> "General orders of this sort entered by the Board with respect to back pay and reinstatement manifestly contemplate further administrative action on its part, i.e. determination of the exact amount of back pay to be tendered and *determination as to what positions are available and substantially equivalent* for the purposes of the reinstatement ordered. Such general orders are analogous to interlocutory judgments of

> courts fixing liability but leaving for future determination questions as to the amount of liability; and our decrees affirming or enforcing them are analogous to our affirmance of interlocutory judgments on appeal. After the general order of the Board for back pay and reinstatement is affirmed or ordered enforced by us, the Board must work out the details of reinstatement and of the amounts to be paid as back pay under the general provisions of the order. This can ordinarily be done by negotiation; but, if controversy arises, the facts must be found by the Board, the body to which Congress has committed the administrative process."

*NLRB v. Local 776, IATSE (Film Editors)*, 303 F.2d 513, 521 (9th Cir. 1962), *quoting Home Beneficial Life Ins. Co. v. NLRB*, 172 F.2d 62, 63 (4th Cir. 1949) (emphasis added). See also *NLRB v. Deena Artware Inc.*, 361 U.S. 398, 412 (1960) (Frankfurter, J., concurring); *Great Chinese American Sewing Co. v. NLRB*, 578 F.2d 251, 255-56 (9th Cir. 1978).

B. Backpay Computations

The Board found that the company's unlawful use of its no-transfer policy so discouraged employees from requesting transfer that the Board was unable to determine whether the union would have had majority status upon the opening of the Gucci shop in the absence of discrimination. It therefore found a bargaining order to be inappropriate. However, "solely for the purpose of remedying a past course of unlawful conduct," and relying on the general principle that uncertainties created by the wrongdoer's conduct should be resolved against the wrongdoer, the Board ordered that backpay should be computed as if the collective bargaining agreement had been in effect regarding wages and benefits.

We find nothing punitive in the remedy so ordered. The Board expressly declined to order the company to apply the contract propsectively or to bargain with the union unless an actual majority was established, thus avoiding the risk of imposing an involuntary bargaining relationship on the parties.

In *Leeds & Northrup Co. v. NLRB*, 391 F.2d 874 (3rd Cir. 1968), the Third Circuit enforced the Board's order requiring

the company to grant backpay to union employees based on a prior compensation formula where the company had unilaterally altered the formula in violation of its duty to bargain. It was impossible to ascertain whether, had the union and the company bargained over the issue, the old formula would have been maintained. Nevertheless, the court found the award supported by the possibility that "the union might have successfully resisted all or a portion of the reduction . . . and the employees should not be left in a worse position than they might have enjoyed if the union had been given the opportunity to bargain." 391 F.2d at 880. The court recognized that "a retroactive order might afford the employees a better position than the union's bargaining might have achieved, " *id.*, but concluded that the Board did not exceed its authority by resolving the doubt against the party who violated the Act.

Although *Leeds* preceded the adoption of the *Wright Line* mode of analysis, it is not inconsistent with it. Once the *prima facie* showing is made under *Wright Line*, the employer has the burden of establishing that its action would have been the same absent discrimination. Although for purposes of an 8 (a) (5) violation, the burden is on the union to establish that it did have a majority (unless the employer's actions made an uncoerced choice impossible), for the purpose of remedying an 8 (a) (3) violation, it is not inappropriate to hold the employer responsible when it fails to establish that the union would not have had a majority.

## CONCLUSION

The Board's determination that Joseph Magnin violated section 8 (a) (3) and (1) of the Act by refusing to transfer employees in order to avoid unionization of its Gucci shop is supported by substantial evidence on the record as a whole. The Board did not abuse its discretion in refusing to defer to the arbitrator's award under the facts of this case. We also find that the remedy ordered by the Board fairly effectuates the policies of the Act. For these reasons, we enforce the order of the Board.

## FOOTNOTE

[1]The relevant sections provide:

> (a) It shall be an unfair labor practice for an employer—
>
> (1) to interfere with, restrain, or coerce employees in the exercise of [organization] rights. . . .
>
> (3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization.

29 U.S.C. § 158 (a) (1), (3).

[2]We note that the Board did not alter the arbitrator's finding as to the violation, but simply supplemented the remedial portion of the award based on the complete record developed before it. The dissent admits that the Board's analysis in this regard "may be a plausible interpretation of the third prong of *Spielberg*," but objects to the lack of explanation contained in the Board's order. It appears to us, however, that where the Board incorporates an ALJ's specific finding that the arbitrator was unable to make the findings necessary to provide a proper remedy, its refusal to defer to the arbitrator's limitation of remedy must logically be based on the Board's longstanding policy of ordering complete relief for proven violations, and the necessary corrollary of that policy, that incomplete relief is repugnant to the purposes and policies of the Act. "A fuller statement by the Board of its reasons for this conclusion would, as [the dissent] states, have been helpful. We cannot say, however, that its refusal to defer on the ground of repugnance to the Act was, on the record before the ALJ, an abuse of discretion." *NLRB v. Max Factor*, 640 F.2d at 202 (citations omitted).

RE: *NLRB v. Joseph Magnin Co. - No. 82-7165*

WALLACE, Circuit Judge, concurring in part and dissenting in part:

I concur in part I of the majority opinion, which enforces the Board's decision on the section 8(a) (1) and section 8(a) (3) charges, and in part IIIA, which upholds the Board's transfer remedy. I dissent from part II of the majority opinion, which upholds the Board's refusal to defer to the arbitrator's denial of backpay to the seven union employees. As a result, I find it unnecessary to reach the merits of the backpay issue, which are discussed in part IIIB.

Although the Board is granted wide discretion in its decision whether to defer to an arbitration award, *see Alfred M. Lewis, Inc. v. NLRB*, 587 F.2d 403, 407 (9th Cir. 1978); *Hawaiian Hauling Service, Ltd. v. NLRB*, 545 F.2d 674, 676 (9th Cir. 1976), *cert. denied*, 431 U.S. 965 (1977) (*Hawaiian Hauling*), it abuses that discretion "if it fails to follow its own deferral standards or if the standards themselves are invalid." *Ad Art, Inc. v. NLRB*, 645 F.2d 669, 675 (9th Cir. 1980) (*Ad Art*); *NLRB v. Max Factor & Co.*, 640 F.2d 197, 201 (9th Cir. 1980), *cert. denied*, 41 U.S. 983 (1981) (*Max Factor*); *Hawaiian Hauling, supra*, 545 F.2d at 676. The Board may change its mind or alter its standards without necessarily engaging in abuse of discretion. *Id.* at 676 & n.6; *accord Ad Art, supra*, 645 F.2d at 675 n.2. Nevertheless, the Board is "required to explain departures from [its] policies or rules so that a reviewing court is able to determine if [it] was acting in a reasoned, deliberate manner." *NLRB v. Cofer*, 637 F.2d 1309, 1312 (9th Cir. 1981) (discussing Board's self-imposed jurisdictional limitations), *quoting Bob's Big Boy Family Restaurants v. NLRB*, 625 F.2d 850, 852 (9th Cir. 1980) (discussing Board's self-imposed contract-bar rule). In short, the Board must either follow its own rules or explain why those rules should be disregarded in any particular case. *Id.* at 853.

The arbitrator here found that the company had discriminated against union members, but he refused to award backpay. He specifically found that, on the average, employees at the old O'Farrell store earned more in commissions than did employees

at the new Post store. Thus, the seven employees suffered no damages from Magnin's discriminatory refusal to transfer them, and a backpay award was unwarranted. The union responded that the employees would have earned higher commissions had the collective bargaining agreement been in effect at the Post store, and that the figures should be adjusted to reflect the difference. The arbitrator rejected this contention and stated: "No evidence is provided or suggested, however, that would enable such an adjustment to be made. Accordingly, this requested relief is denied."

The Board refused to defer to the arbitrator's decision, stating that the arbitrator "was not presented with sufficient evidence by the parties and therefore was unable to make findings of fact crucial to shaping the necessary remedy with regard to backpay for the employees denied transfers by Respondents." *Joseph Magnin Co.*, 257 N.L.R.B. 656, 656 n. (1981). The question is whether this proffered reasoning is encompassed by any of the Board's deferral standards, or if the Board has explained its departure from its previously announced rules.

The only case the Board cites in its order for refusing to defer, *Triple A Machine Shop, Inc.*, 245 N.L.R.B. 136 (1979) (*Triple A*), is not on point. There, the Board found that the arbitrator had not considered statutory issues that were before him, had failed to make necessary credibility and factual findings, and had issued "compromise" awards. *Id.* at 137. As the dissent in *Triple A* pointed out, the majority imputed bad faith to the arbitrator and suggested that he had attempted to avoid further proceedings. *Id.* at 138 (Member Penello, dissenting).

The arbitrator's behavior in our case cannot be so characterized. He considered all the issues before him and rejected the union's request for backpay, not on legal grounds, but only because the union had not substantiated its claims. The record clearly indicates that had the union proven its damages, backpay would have been granted. Thus, this is not a case in which the arbitrator refused to pass on a statutory issue, *see Stephenson v. NLRB*, 550 F.2d 535, 537 (9th Cir. 1977) (*Stephenson*); *Greif Brothers Corp.*, 238 N.L.R.B. 240, 243 (1978), *vacated*

*on other grounds*, 635 F.2d 531 (6th Cir. 1980), rejected Board precedent, *see Stephenson, supra*, 550 F.2d at 537; *Alfred M. Lewis, Inc. v. NLRB, supra*, 587 F.2d at 407-08, or ordered reinstatement without backpay in an attempt to effectuate a compromise award, *see Cessna Aircraft Co.*, 220 N.L.R.B. 873, 874-75 (1975).[1]

The Board's decision also contradicts the policy behind its deferral standards, which is to favor voluntary settlement of labor disputes through arbitration. *Ad Art, supra*, 645 F.2d at 674; *Max Factor, supra*, 640 F.2d at 201; *Spielberg Manufacturing Co.*, 112 N.L.R.B. 1080, 1082 (1955). In effect, it places the burden on the arbitrator to develop the necessary evidence to substantiate positions taken by the parties. This contradicts the general rule that the burden of production of evidence in arbitration proceedings is on the party that makes an allegation. *See* F. Elkouri & E. Elkouri, *How Arbitration Works* 279 (3d ed. 1973). Such a holding undermines the finality and integrity of arbitration decisions and thus can only discourage parties from settling their disputes through the arbitration process.

I do not interpret *Triple A* as shifting the burden of production of evidence from the charging party to the arbitrator; nor has the Board cited any case endorsing such a shift. Thus, the Board has failed in its order either to follow its own standards or to explain its departure from those standards.[2]

In its brief filed in our court, the Board shifts ground and asserts the third prong of *Spielberg* as its reason for refusing to defer. It contends that the arbitrator's decision was repugnant to the purpose and policies of the Act because he failed to provide a make-whole remedy. *See Golden State Bottling Co. v. NLRB*, 414 U.S. 168, 186-87 (1973); *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177, 187-89 (1941). The Board apparently seeks to distinguish the arbitrator's remedial authority from his authority to decide statutory allegations. Although its reasoning is not fully developed, the Board implies that once an arbitrator has found a statutory violation, the Board will review his proposed remedy de novo to determine if it fully compensates the aggrieved party, regardless of whether the arbitrator has diligently performed his task or whether the charging party has failed to substantiate its claim for relief during the arbitration

process. The majority opinion appears to rely more on the Board's argument in its brief than on the rationale provided in the order.

The Board's analysis may be a plausible interpretation of the third prong of *Spielberg*, or provide sufficient explanation for the Board's departure from its traditional standards in this case. Unfortunately, this reasoning, which is barely touched upon in its brief, is not contained at all in the Board's published order. *See* 257 N.L.R.B. at 656 n.1. It is axiomatic that "[t]he grounds upon which an administrative order must be judged are those upon which the record discloses that its action was based." *Securities & Exchange Commission v. Chenery Corp.*, 318 U.S. 80, 87 (1943); *FTC v. Sperry & Hutchinson Co.*, 405 U.S. 233, 249-50 (1972); *Bob's Big Boy Family Restaurants v. NLRB, supra,* 625 F.2d at 854 (We are not permitted to "substitute a different rationale for the rationale provided by the Board.").

Because the Board fails, in its order, to follow its own deferral standards or to explain its departure from those standards in this case, I dissent from part II of the majority's opinion and therefore would not reach the question discussed in part IIIB.

## FOOTNOTES

[1]Nor is *Suburban Motor Freight, Inc.* 247 N.L.R.B. 146 (1980), which is cited by the majority, on point. The backpay issue here was both presented to and considered by the arbitrator.

[2]The union does not allege that it was unable to secure information because it was within the control of the employer or otherwise unattainable.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

| | | |
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| NATIONAL LABOR RELATIONS BOARD, *Appellee,* | ) | No. 82-7165 |
| *v.* | ) | ORDER |
| JOSEPH MAGNIN COMPANY, *Apellant.* | ) | [Filed July 27, 1983] |

Before: WALLACE and FERGUSON, Circuit Judges, and GRANT,* District Judge.

The panel as constituted in the above case has voted unanimously to deny the petition for rehearing; Judges Wallace and Ferguson voted to reject the suggestion for rehearing en banc and Judge Grant made no recommendation on the suggestion for rehearing en banc.

The full court has been advised of the suggestion for rehearing en banc and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35(b).

The petition for rehearing is denied, and the suggestion for rehearing en banc is rejected.

*Hon. Robert A. Grant, Senior United States District Judge, Northern District of Indiana, sitting by designation.

DECISIONS OF NATIONAL LABOR RELATIONS BOARD

**Joseph Magnin Company, Inc.** ***and*** **Department Store Employees Union, Local 1100, United Food and Commercial Workers International Union, AFL-CIO.**
Case 20-CA-14321

August 10, 1981

DECISION AND ORDER

On December 16, 1980, Administrative Law Judge Martin S. Bennett issued the attached Decision in this proceeding. Thereafter, Respondent, the General Counsel, and the Charging Party filed exceptions and supporting briefs; Respondent filed a brief in answer to the exceptions of the General Counsel and the Charging Party; and the Charging Party filed a brief in answer to Respondent's exceptions.

The National Labor Relations Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings,[1] findings, and

[1]At the hearing, the Charging Party moved to defer resolution of the 8(a)(3) allegation to the decision of Arbitrator Grodin rendered on July 16, 1979. Both Respondent and the General Counsel opposed the motion. Without ruling formally on the Charging Party's motion to defer, the Administrative Law Judge formed independent conclusions concerning the discrimination issue, although in so doing he found the arbitrator's decision entitled to great weight. Citing *Spielberg Manufacturing Company*, 112 NLRB 1080 (1955), the Charging Party has renewed before the Board its motion to defer, in the form of an exception to the Decision of the Administrative Law Judge. After careful consideration of the record and briefs, including the record in the arbitration proceeding, we are of the opinion that deferral is inappropriate in this case. Arbitrator Grodin was not presented with sufficient evidence by the parties and therefore was unable to make findings of fact crucial to shaping the necessary remedy with regard to backpay for the employees denied transfers by Respondent. See *Triple A Machine Shop, Inc.*, 245 NLRB 136 (1979). We therefore hereby deny the Charging Party's motion to defer to the arbitrator's award, and we uphold the ruling of the Administrative Law Judge.

**APPENDIX C**

conclusions[2] of the Administrative Law Judge but to modify his recommended Order consistent with the additional remedy granted herein.

The Administrative Law Judge concluded, and we agree, that Respondent violated Section 8(a)(3) and (1) of the Act by prohibiting the transfer of hourly paid employees to its newly opened Gucci specialty store on Post Street from stores at which these employees were represented by the Union pursuant to the terms of a collective-bargaining agreement. The Administrative Law Judge found that Respondent's refusal to permit the transfer of union members was motivated by a desire to prevent the Union from gaining majority status at the new store. Nevertheless, he dismissed the General Counsel's allegation that Respondent violated Section 8(a)(5) of the Act by refusing to recognize and bargain with the Union because the evidence did not establish that the Union had obtained an actual majority at Post Street and because the number of identifiable discriminatees was not sufficient to demonstrate conclusively that the Union would have obtained majority status had the unfair labor practices not been committed. Both the General Counsel and the Charging Party have filed an exception, arguing that a bargaining order is an appropriate and necessary remedy for Respondent's violation of the Act and that the record is sufficient to establish the Union's entitlement to a legal presumption of majority status as of October 1978. While we disagree with the General Counsel and the Charging Party that a nonmajority bargaining order is an appropriate remedy in this case, we find that the recommended Order of the Administrative Law Judge falls short of the relief to which the Charging Party is entitled.

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[2]We adopt the conclusion of the Administrative Law Judge that Respondent violated Sec. 8(a)(1) and (3) of the Act by discriminating with respect to transfer and employment opportunities at its new Post Street store on the basis of union membership. In doing so, however, we do not rely on the Administrative Law Judge's discussion of the Embarcadero situation at sec. 4, par. 6, to the extent that he appeared to find independent violations of the Act based on events which occurred outside the statutory 10(b) period. We agree with the Administrative Law Judge's analysis of the events that occurred when the Embarcadero store was opened, however, insofar as they provide only background evidence for the violation found in the instant case.

At the time Respondent opened its store on Post Street, the employees in all its other San Francisco stores were represented by the Union in a single bargaining unit. During a bargaining relationship of 30 or more years, Respondent and the Union have routinely included in their collective-bargaining agreements an after-acquired-stores clause designating the Union as the exclusive collective-bargaining agent for the employees in all of Respondent's San Francisco stores. Pursuant to this clause, Respondent has in most cases[3] voluntarily recognized the Union whenever it opened a new store in San Francisco. At the time this dispute arose, the bargaining unit was comprised of approximately 200 employees of Respondent's 4 retail stores in San Francisco and approximately 300 employees of Respondent's headquarters on Harrison Street.

In *Houston Division of the Kroger Co.*,[4] the Board concluded that a contractual clause such as the one by which Respondent is bound constitutes a waiver of an employer's right to insist upon a Board-conducted election when faced with a demand for recognition but that it does not relieve a union of its obligation to provide the employer with proof of its majority status among the employees in the group to be added to the existing unit. By this interpretation of after-acquired-stores provisions, the Board allows parties as much freedom as possible to structure their bargaining relationship through negotiations without permitting them to deny to affected employees the statutory right to select or reject a bargaining representative. Under usual circumstances, therefore, Respondent's statutory duty to recognize the Union as the representative of the Gucci store employees and to apply the current collective-bargaining agreement to the new operation would have arisen only if the Union presented it with concrete evidence of support by a majority of the Gucci store employees.

The circumstances of this case are not usual, however. Here, Respondent carefully considered the financial advantages of escaping its contractual obligations to the Union and to the

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[3]The sole exception to the pattern of voluntary recognition occurred at the Embarcadero store, at which the Union subsequently won a Board-conducted election.

[4]219 NLRB 388 (1975).

unionized employees if it could prevent the Union from gaining majority support at the new Gucci store. Having determined the desirability of reducing commissions and labor costs, Respondent deliberately embarked on a course of conduct designed to forestall union presence at the new facility and thus to avoid application of the agreed-upon wage and benefit structure.[5] In this campaign Respondent was entirely successful. It refused to transfer union members to the Post Street store and, by requiring that members of the bargaining unit quit their jobs before even making applicaiton for jobs at the new store, so discouraged application that at this point it is not possible to determine precisely how many employees would have sought transfers had the quit-and-reapply requirement not been imposed.[6] We are thus faced with a situation in which the traditional redress recommended by the Administrative Law Judge does not remedy all the unfair labor practices committed by Respondent and does not restore the *status quo ante*. As the agency entrusted with administration of the Act we cannot sanction a party's attempt to avoid contractual obligations lawfully undertaken when the method of avoidance constitutes an independent unfair labor practice. Nor should we place unnecessary restrictions upon our authority to remedy serious violations of the Act, since failure to grant appropriate relief not only leaves injured parties without redress but also encourages more violations of the same nature. We therefore conclude that Respondent must be required to reconstruct the first day of its operation of the Post Street store as it would have occurred absent Respondent's unlawful conduct. To that end, we shall require Respondent to transfer immediately to the Gucci shop on Post Street all employees who applied for transfer and were rejected because of their union affiliation, as well as all employees who were discouraged from applying for transfer because of their union affiliation, terminating employees presently

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[5]When the Post Street store opened without a majority of union members in the employee complement, Respondent unilaterally changed the wage structure from the salary-plus-incentive-bonus system mandated by the collective-bargaining agreement to a commission-against-draw system.

[6]We note that the evidence adduced at the hearing establishes that Respondent's discriminatory policy was well publicized among the employees affected by it.

employed at Post Street, if necessary, to provide jobs for the transferees. In addition, solely for the purpose of remedying a past course of unlawful conduct, we shall assume that, on the first day the Post Street store opened for business, had Respondent committed no unfair labor practices, the Union would have represented a majority of the Post Street employees and the contract between the parties would have applied. Therefore we shall require that the backpay due the transferees be computed on the basis on the contractual wage and benefit structure that would have been in effect had Respondent not prevented the Union from gaining a majority in the Post Steet store.[7]

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the Respondent, Joseph Magnin Company, Inc., San Francisco, California, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Refusing to transfer hourly employees to other of its departments, stores, or other facilities because those employees are members of Department Store Employees Union, United Food and Commercial Workers International Union, Local 1100, AFL-CIO, or any other labor organization.

(b) Telling hourly employees that they must resign their present positions in order to effect a transfer to any of its other departments, stores, or facilities because these employees are members of the Union.

(c) In any like or related manner discriminating against employees with regard to hire or tenure of employment or any term or condition of employment for engaging in activities on behalf of a labor organization or for engaging in activity protected by Section 7 of the Act.

(d) In any like or related manner interfering with, restraining, or coercing employees in the exercise of any right guaranteed

[7]In fashioning such a retrospective remedy, we expressly decline to order that Respondent apply the contract *in futuro* or that it recognize and bargain with the Union in the absence of a demonstration of majority support.

them by Section 7 of the Act.

2. Take the following affirmative action deemed necessary to effectuate the policies of the Act:

(a) Rescind any personnel policy prohibiting the interstore or intrastore transfer of hourly employees which is designed and intended to discriminate against such employees because of their membership in or activities on behalf of the Union.

(b) Immediately transfer to its Gucci store at 253 Post Street, San Francisco, California, any employees found to have been discriminated against because of union membership either by being denied transfer opportunities or by being discouraged from applying for transfer, discharging if necessary any employees now filling the positions to which the discriminatees are to be transferred, and to make them whole in the manner set forth in that section of the Administrative Law Judge's Decision entitled "The Remedy," as modified herein.

(c) Preserve and make available to the Board or its agents all payroll and other records necessary to determine the transfer rights and to compute the backpay rights set forth herein and in the section of the Administrative Law Judge's Decision entitled "The Remedy."

(d) Post at its San Francisco, California, facilities copies of the attached notice marked "Appendix."[8] Copies of said notice, on forms provided by the Regional Director for Region 20, after being duly signed by its authorized representative, shall be posted by it immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Joseph Magnin Company, Inc., to insure that said notices are not altered, defaced, or covered by any other material.

(e) Notify the Regional Director for Region 20, in writing, within 20 days from the date of this Order, what steps Respondent has taken to comply herewith.

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[8]In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

## APPENDIX

### NOTICE TO EMPLOYEES
### POSTED BY ORDER OF THE
### NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

After a hearing at which all sides had an opportunity to present evidence and state their positions, the National Labor Relations Board found that we have violated the National Labor Relations Act, as amended, and has ordered us to post this notice.

WE WILL NOT prevent hourly employees from interstore or intrastore transfers because they are members of Department Store Employees Union, Local 1100, United Food and Commercial Workers International Union, AFL-CIO, or any other labor organization.

WE WILL NOT tell hourly employees that they must resign from their current positions before they may transfer to another of our stores, departments, or facilities because they are members of the Union.

WE WILL NOT in any like or related manner discriminate against employees with regard to hire or tenure of employment or any term or condition of employment for engaging in activities on behalf of the Union, or any other labor organization, or for engaging in activity protected by Section 7 of the National Labor Relations Act, as amended.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of any right guaranteed them by Section 7 of the Act.

WE WILL rescind any personnel policy prohibiting the interstore or intrastore transfer of hourly employees which is intended to discriminate against employees because of their membership in or activities on behalf of the Union.

WE WILL immediately transfer to our Gucci store at 253 Post Street, San Francisco, California, any employees found to have been discriminated against because of their union membership, discharging if necessary any employees now holding positions to which such discriminatees are entitled.

We will make the aforementioned discriminatees whole with interest for any losses they may have suffered by reason of the discrimination practiced against them.

JOSEPH MAGNIN COMPANY, INC.

## DECISION

### STATEMENT OF THE CASE

MARTIN S. BENNETT, Administrative Law Judge: This matter was heard in San Francisco, California, on August 27 and 28, 1980, pursuant to a complaint issued by the Acting Regional Director for Region 20 on December 18, 1979. The complaint is based on a charge filed on January 10, 1979, and an amended charge filed on November 1, 1979, by Department Store Employees Union, Local 1100, United Food and Commercial Workers International Union, AFL-CIO (hereinafter the Union or the Charging Party). The complaint alleges that Joseph Magnin Company, Inc. (hereinafter Respondent)[1] has engaged in and is engaging in unfair labor practices violative of Section 8(a)(1), (3), and (5) of the National Labor Relations Act, as amended (29 U.S.C. § 151, *et seq.*) (hereinafter called the Act).

All parties have been afforded full opportunity to appear, to introduce evidence, to examine and cross-examine witnesses, and to file briefs. Briefs have been received from the General Counsel, Respondent, and the Charging Party.

Upon the entire record in the case, from my observation of the demeanor of the witnesses, and after careful consideration of the briefs, I make the following:

## FINDINGS OF FACT

### I. JURISDICTION

Respondent Joseph Magnin Company, Inc., has been since January 1, 1978, a corporate division under the ownership of New Magnin, a Delaware corporation. Respondent now has and at all times material herein has had its principal place of business in San Francisco, California, from which it operates a chain of department stores under the name of Joseph Magnin

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[1] The complaint and the other formal documents in this case set forth the name of Respondent as Joseph Magnin d/b/a Gucci Shop. While no formal motions were made to do so, I have amended Respondent's name herein to reflect the true name of Respondent as set forth in its answer to the complaint.

and a chain of stores under the name of Gucci which is engaged in the retail sale of products manufactured by the family of that well-known Italian designer. In the normal course and conduct of these operations during the past fiscal year, Respondent derived gross revenues in excess of $500,000 and purchased products valued in excess of $50,000 directly from suppliers located outside the State of California. Accordingly, I find, as admitted in the answer, that Respondent is and at all times material herein has been an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act.

## II. THE LABOR ORGANIZATION INVOLVED

Department Store Employees Union, Local 1100, United Food and Commercial Workers International Union, AFL-CIO, is and has been at all times material herein a labor organization within the meaning of Section 2(5) of the Act.

## III. THE ISSUES

1. Did Respondent Joseph Magnin Company, Inc., violate Section 8(a)(3) and (1) of the Act by prohibiting the transfer of its hourly paid department store employees to a new "free-standing" Gucci store on Post Street in San Francisco (which store is owned and operated by Respondent) because said hourly employees joined, supported, or assisted the Union and engaged in concerted activities for the purpose of collective bargaining or other mutual aid or protection, and in order to discourage such activities?

2. Did Respondent violate Section (a)(5) and (1) of the Act by refusing to recognize the Union as the collective-bargaining representative of employees at Respondent's Post Street Gucci store?

3. Did the alleged unlawful acts of Respondent under Section 8(a)(3) prevent the Union from acquiring a majority at the Post Street Gucci store? Is a bargaining order an appropriate remedy in such a situation?

## IV. THE ALLEGED UNFAIR LABOR PRACTICES

### A. *The 8(a)(3) Allegations*

#### 1. Background: The Embarcadero opening and the no-transfer policy

A somewhat lengthy historical analysis is relevant and necessary to a thorough understanding of the events and issues raised in the instant matter.

Respondent and the Union have been signatories to successive collective-bargaining agreements for some 30 years or more. Each of those agreements (including those applicable to the events in the instant case, *viz*, the agreements covering the periods 1975-78 and 1978-81, respectively) contains the following clause which lies at the bottom of this dispute:

> *Section 1. Recognition*
>
> The Union is recognized as the sole collective-bargaining agent for all employees employed at the San Francisco stores of Joseph Magnin except for executives as defined in Section 2 (Definition of Executives) and for the classifications listed in Appendix A.

The General Counsel and the Union contend that section 1 of the agreement is a valid "after-acquired-stores" clause under applicable Board precedent; and it appears that, at least until the opening of its Embaracadero store in early 1977, Respondent construed section 1 in the same fashion, and extended recognition to the Union when it opened new stores in San Francisco during the 1960's and early 1970's. When Respondent opened its Embarcadero store on February 10, 1977, however, it refused to extend the contract and recognize the Union and instead filed a petition for an election. The Union then filed an unfair labor practice charge with the Board alleging violations of Section 8(a)(1), (3), and (5). That charge was premised on allegations that Respondent unlawfully withheld recognition and that Respondent had refused to hire union members to staff the Embarcadero store or to permit the transfer of hourly employees from its other San Francisco stores (all of such employees' being union members under the collective-bargaining agreement's union-shop provisions) to the Embarcadero store. The

charge was dismissed following Region 20's investigation and, on appeal to the General Counsel, that dismissal was upheld; the Board then conducted an election at the Embarcadero store, which the Union won.

The aspect of the Embarcadero events particularly relevant herein is Respondent's refusal to transfer hourly employees from its other San Francisco stores to the new Embarcadero store. Respondent asserts that it has a "longstanding" policy against the transfer of hourly employees from one store to another; the one general exception is an employee's "relocation" from one geographic area to another, but Respondent has also permitted transfers in what it deems "special circumstances"—e.g., a job promotion. Respondent asserts that this no-transfer policy applies to all of its hourly employees in all of its stores, which the record shows are located in various cities in California, Nevada, and Hawaii.

Four of Respondent's top management personnel testified to the existence of Respondent's policy of not permitting the transfer of hourly paid employees from one store to another. The policy was justified on two major grounds: It was designed to promote the development of a personal "book" of clients by each salesperson, and it was designed to prevent raiding, i.e., stealing away of productive sales employees by jealous store managers, as well as to prevent the dumping of unproductive employees into other stores by disgruntled store managers.

Elsa Lane, who was hired as Respondent's director of employee relations in March 1978, testified that Respondent's no-transfer policy existed in writing at the time of her hire and that she assumed that it had existed prior to 1977. Michael Raskin, who joined Respondent as its president in February 1978 but who has since left the Company, testified that he learned of the no-transfer policy in the spring of 1978 and that he was told that the policy had existed for some time. Harmon Tobler, who joined Respondent as a vice president in September 1978 and who is now its president, testified that shortly after he joined the Company he learned of the no-transfer policy from Elsa Lane. These executives each testified as to the original or current justifications for the no-transfer rule, such justifications being those recited above. Tobler testified that he "was brought

to Joseph Magnin" to develop the personal clientele concept for Respondent's salespeople; he further testified that "a major plank in the program that I brought to Joseph Magnin" was retaining salespeople in the stores where they were, rather than permitting transfers. Respondent introduced in evidence a copy of its written no-transfer rule (Resp. Exh. 5); that excerpt from its policy manual is dated "9/26/77."

Michael Richards also testified about Respondent's no-transfer policy. Richard is the current manager of Respondent's Montgomery Street store in San Francisco. He has been a store manager since January 1975, and has managed two stores in addition to the one on Montgomery Street. Richards testified that Respondent's no-transfer policy existed in writing when he became a store manager in January 1975, and he also testified that "it said in 1975 that an employee to be transferred from one branch to another, there should be a specific reason for the transfer and a job available, based upon qualifications and openings."

The recitation of the facts raises several considerations which went unanswered at the hearing. The Union did not learn of any policy prohibiting transfers until the opening of the Embarcadero store, and it contested the application of the policy at that time. There is some doubt in my mind as to whether a policy prohibiting transfers actually existed, at least in writing, when the Embarcadero store opened in early 1977. The policy document produced in evidence herein bears a date some 7-1/2 months following the Embarcadero opening. That document has spaces to record superseded policies and the effective dates of such—those spaces appear blank on the page from the policy manual placed in evidence (Resp. Exh. 5). Richards, an experienced store manager who should be familiar with all company personnel policies, testified that a written policy existed 2-1/2 years before the date of the one submitted herein, yet no such document was introduced nor was its absence explained. Indeed, the policy Richards recited could arguably be interpreted by its terms not to preclude transfers between stores. Finally, Tobler asserted that a no-transfer policy was a major part of his sales development scheme; yet he testified as to his rationale to justify a policy, allegedly longstanding, which preceded him by a year. No one was

produced to explain why the policy was originally conceived—it predated the arrival of the three top management personnel by 4, 5, and 12 months, respectively. Nor had its purpose ever been explained to Richards, who over nearly 6 years has managed three stores. All of these factors lead me to conclude that no clear policy precluding interstore transfers existed prior to the Embarcadero opening, and that it was 7 months after that opening before a policy to the effect was actually promulgated.

Several additional factors enhance the soundness of such a conclusion:

(1) When Respondent opened its Magnarama operation in a separate facility in 1975 (this operation—engaged in the sale of "overbought" items at reduced prices—was run as a department of Store 1[2]), it transferred Store 1 employees to that facility, and then transferred them back when Magnarama was closed in 1978.

(2) Nancy Nunes, Vicki Rae, and Ronna Schulkin were permitted to transfer to the Embarcadero store from the Oakland, California, store when the former opened in early 1977. An estimated four employees from other San Francisco stores of Respondent were not permitted to transfer to Embarcadero (it was this event which formed the basis for the 8(a)(3) charge filed in the Embarcadero dispute alluded to above—the administrative dismissal of that charge does not preclude me from discussing those aspects of that case litigated herein).

Respondent contends that each of the three above-named transferred employees falls within an exception to its no-transfer policy. Nunes, Respondent contends, transferred for more hours and thus received a promotion; it contends that Rae and Schulkin each had an "established San Francisco customer list." Respondent does not attempt to explain these transfers on the basis of geographic relocation, the one clearly delineated exception to its existing no-transfer rule (see Resp. Exh. 5) and, indeed, could not logically do so. Nor does Respondent's explanation of Nunes' transfer as a special circumstance hold much merit, for, *arguendo*, it is not unreasonable to assume,

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[2]Store 1, or the O'Farrell Street store, appears from the record to be the flagship of Respondent's San Francisco Bay area department stores.

without deciding, that perhaps at least one of the four San Francisco employees who unsuccessfully sought transfer to Embarcadero had hoped to obtain longer working hours available there. Similarly, Respondent's explanations for the permitted transfers of Rae and Schulkin lack substantial merit.

(3) Union Representative Susan Monihan testified without contradiction or dispute that Elsa Lane had conceded in a May 1979 meeting that certain of the employees listed in General Counsel's Exhibit 17 (a list of interstore employee movement accompanied by Respondent's rationalizations therefor) were transfers or had been transferred. The lack of a specific denial on this point is particularly telling since that exhibit was the subject of much discussion in the instant litigation. In view of all of the above, the assertion that Respondent's policy prohibiting interstore transfer of hourly employees is longstanding becomes doubtful at best. At the very least, the administration of that policy has been inconsistent and perhaps even arbitrary.

2. The Post Street opening

Sometime during 1977 or early 1978, Respondent began formulating plans to establish a small store independent of its department stores which would be engaged in the sale of nothing but the various products of Italian designer Aldo Gucci.[3] Respondent had been selling Gucci's products from a boutique or department within its store on O'Farrell and Stockton Streets in San Francisco (Store 1) since sometime in the early 1970's; apparently the Company had and continues to have similar Gucci boutiques in various of its other department stores. On April 15, 1978,[4] Aldo Gucci and Respondent executed an agreement whereby Respondent was, *inter alia*, to open an independent or "freestanding" shop on Post Street in San Francisco dealing exclusively in Gucci products.

The Union first learned of the Company's plans for the freestanding Post Street Gucci store in mid-1978. After an employee of Store 1's Gucci department reported a rumor of

[3]These products include leather goods, such as shoes, boots, handbags, and belts and scarves, jewelry, and other "ready-to-wear" apparel items.

[4]All dates hereinafter refer to 1978 unless otherwise stated.

the Post Street plans, Union Business Representative Susan Monihan requested a letter from the Company explaining the proposed Post Street Gicci store. In a June 13 letter to Monihan and Union Secretary-Treasurer Richard Williams, Elsa Lane, Respondent's director of employee relations, indicated that:

> . . . a division has been created which will probably be operating a Gucci store on Post Street. . . . I also understand that the Gucci department in our Downtown San Francisco store (#1) will remain open.

Also sometime during June, Monihan testified that she attended a board of adjustment meeting in a conference room of Respondent's headquarters building.[5] She testified that at this meeting, which was to deal with the grievance or grievances of employee Vincent Washington, she observed artists' renderings of the Gucci store that later opened on Post Street adorning the walls of the meeting room. Monihan testified without contradiction that:

> . . . during the course of the adjustment board [hearing], we had a caucus and the union took their caucus inside the conference room and the company left. That's when we first noticed the pictures. We looked at them very carefully and then there was a subsequent caucus in which the company asked the union to leave, and when we came back to reconvene the adjustment board hearing, there was brown paper over all the artists' renderings, covering them up.

Employee Lewis Silcox, who works in the Store 1 Gucci department, testified that he and other employees first learned of the planned Post Street Gucci store opening when telephoned who had read about those plans in the column of San Francisco Chronicle writer Herb Caen.

Sometime during September Margaret McCoy, an employee in Store 1's Gucci department, apparently inquired about

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[5]That building is located at 59 Harrison Street in San Francisco. The witnesses and the parties herein referred to it variously as the central office building or the central operations building of Joseph Magnin; all referred to it in short as the COB. I shall refer to it hereinafter as the COB.

transferring to the new Post Street Gucci store. While there is no direct testimony on this point, McCoy apparently was told that she would have to resign her current position and be rehired with a new employment date in order to effect a transfer to Post Street. (See G.C. Exh. 7, a letter from Union President Walter Johnson to Elsa Lane alleging these facts.) McCoy's attempt to transfer led to the scheduling of a board of adjustment meeting where the Union apparently hoped to grieve the issue.

On October 8 a classified advertisement appeared in the Sunday San Francisco Chronicle-Examiner telling of full-time and part-time sales openings in "The New Gucci Shop Opening in Downtown San Francisco." The ad gave no further identification of the employer, but listed a telephone number to call for interview appointments. The number was to a Joseph Magnin COB extension; and, as the experience of Store 1 Gucci department employee Christine Azzopardi demonstrated (discussed in more detail *infra*), interested persons were to complete application forms and be interviewed at the COB.

Three union officials (Monihan, Secretary-Treasurer Williams, and President Johnson) and three members (each of whom was a Store 1 Gucci department employee) met with Lane and Ben Waud, Respondent's counsel at that time, to discuss the McCoy transfer grievance on October 10. The union representatives stated that the meeting was a formal board of adjustment hearing pursuant to the collective-bargaining agreement, but apparently Waud disagreed. Waud and/or Lane explained that the Post Street Gucci store was to operated by a separate division of the Company ("the Gucci Division and the Joseph Magnin Division, two separate organizations," Lane testified regarding her comments at this meeting) and that consequently the Union's contact with the Company would not and did not apply to the Post Street Gucci store. Land then told the union delegation that "it was our plan to not transfer hourly employees to that store." Waud maintained that transfers were not at issue because of the "separate corporation[s]," according to Monihan's uncontradicted testimony. Johnson then indicated that the Union's members had a right to transfer under the terms of the collective-bargaining agreement. The meeting ended in a

deadlock on a vote to proceed to arbitration.[6]

The next day (October 11) Christine Azzopardi, one of the Store 1 Gucci department employees who had attended the previous day's meeting, went to the COB to complete an application form and be interviewed for a position at the Post Street Gucci store. Azzopardi had seen the classified advertisement in the previous Sunday's newspaper and, in response to that ad, had telephoned on October 10 to arrange an appointment to fill out an application form. Azzopardi testified that she dealt with Patti Bauer (now Craig) of the personnel office, and that the following took place:

> I was given an application. I filled half of it out and she glanced over to see how much I filled out and she noticed that I had worked for Joseph Magnin and she said oh, are you from the Las Vegas store and I said no, I'm from Store No. 1. She had said I'm sorry that you can't fill out this application and I had answered can I have that in writing, and at that point I stopped filling out the application and she said excuse me for a moment and she retrieved Elsa Lane, [who] was at a meeting at the time.

Azzopardi further testified that Lane emerged from her meeting, saw that Azzopardi had completed half of the application form, and then said (according to Azzopardi):

> Chris, you know the procedure, and I said yes. We had discussed it yesterday at an adjustment board meeting.

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[6]The arbitration award underlying the instant litigation forms an important part of this Decision as will be seen *infra*, but it is convenient to discuss the arbitration procedures at this point. Under the collective-bargaining agreement, when an adjustment board vote on proceeding to arbitration deadlocks, either party may request arbitration after 14 days. After the requisite waiting time, the Union requested arbitration, and the parties agreed on Professor Joseph R. Grodin (now a judge of the California State Court of Appeals) as the arbitrator. Apparently the Company then backed out of the agreement to arbitrate, and the Union sought and obtained a state court order to compel arbitration. The arbitration then proceeded, with Arbitator Grodin rendering his award (which will be discussed in greater detail *infra*) on June 16, 1979, and a letter clarifying that award on September 4, 1979. Sometime thereafter the Union filed a cross-petition to "correct and then confirm" the arbitrator's award; the court granted the petition to confirm and denied the petiton to correct. Respondent has appealed those rulings, and consequently the matter is currently pending on appeal in the California state courts.

> She said you know the procedure, you're going to have to quit your job before you apply. And I said are you denying me the right to fill out this application. She said no, but for an interview, yes.

Lane testified to a slightly different version of their conversation:

> She was very angry that she—about the no transfer stance. I told her that we, as she knew from the meeting yesterday, would not be transferring people. She said do you mean you won't take my application and I said no, Chris, you are perfectly free to complete the application and leave it, I just want you to understand that we intend not to transfer people between the stores. . . .
>
> Q. During that conversation, did you tell her that she could complete an application but that she could not be interviewed?
>
> A. I did not say that. She said can I leave my application and I said you are perfectly free to leave the application, but our intent is not to transfer employees to that Post Street store.

While Lane's testimony on this score is more precise in that she probably did not say to Azzopardi, as the latter testified, "[Y]ou're going to have to quit your job before you apply," I find that, as to the substance and effect of Lane's comments, I am persuaded by Azzopardi's version. This conclusion is founded in large part on Lane's response to the following questions from counsel for the General Counsel on cross-examination:

Q. Isn't it true that it would have been futile for any of the employer's union employees to apply for positions at Gucci without resigning first?

A. No.

Q. Employees could be considered for employment without resigning fist?

A. They could have left the application with me but, as I told Chris, we were not going to transfer hourly employees.

Q. So it would have been a futile act to fill out an application because if you were employed by Joseph Magnin in a union

store you weren't going to be considered unless you resigned first. The act of applying would have been a futile act, isn't that true?

A. That's the interpretation that you are giving it, that it would be futile.

Q. No, I want your interpretation. Don't you believe that the act of applying is futile when you cannot be considered for the position?

A. If I were going to apply for a position for which I could not be considered, I would think that would be a futile effort, yes.

I conclude accordingly that the fact of the matter was that if Azzopardi wanted to work at Post Street, she could not be a current employee of Respondent—in effect, she would have had to resign her then-current employment and attempt to sign on as a new hire.

In addition to the events and incidents recounted above, at various times during 1978 (sometimes unspecified) several employees of Respondent's Store 1 Gucci department consulted supervisory personnel about the possibility of transferring to the soon-to-open Post Street Gucci store. The uncontradicted testimony of various employee witnesses shows the following:

(1) Sometime in the spring of 1978 Lewis Silcox asked Maria Manetti, then Respondent's Director of Gucci Operations, about transferring to Post Street. Manetti indicated that she did not know what the procedure would be nor if there would be automatic transfers and she was, according to Silcox, "very vague." Sometime later Silcox asked Lillian Magnin, "the supervisory manager at that time of the fifth floor [of Store 1]," about transferring. Initially she "was quite vague, too"; when Silcox renewed his inquiry several weeks later Magnin told him that:

> . . . we would not be allowed to transfer and that if we wanted to work at the Post Street shop we would have to resign our present positions, thus losing all of our seniority with Joseph Magnin, in effect just to go to work for the same company, and even to apply for a position at Post Street we would have to resign our position.

(2) Cheryl Austin consulted Ila Adams, a personnel officer of Respondent, Keith Miller, Store 1's operations manager, and Lilian Magnin about the possibility of transferring to Post Street. Austin testified that, during her meeting with those three supervisory personnel, she was told by Magnin and Adams that she would have to resign her position with Store 1 and reapply as a new hire to work at Post Street. Austin, who apparently held some type of low-level supervisory position herself at Store 1, in turn related the substance of this conversation to Store 1 employee Lewis Rusel. Rusel testified that he had considered applying for a job at Post Street until he was told by Austin that he would first have to resign his position at Store 1.

(3) Howard Ferrier was employed in Respondent's supply department at the COB when he learned of the Post Street plans in the fall of 1978. He asked Kurt Bryan and Patti Bauer, personnel officers who apparently were involved in screening applicants for the Post Street Gucci store, about the possibility of transferring to that facility. Bryan told Ferrier that he would have to resign his employment with Joseph Magnin to be considered for a position at the Post Street Gucci store.

(4) Mikio Hirata consulted Lillian Magnin sometime in 1978 about the possibility of transferring to Post Street. Hirata, too, testified that Magnin told him he would have to resign his job at Store 1 and then apply anew for a position at Post Street. Respondent does not contest the alleged agency or supervisory status of Maria Manetti, Lillian Magnin, Ila Adams, Kurt Bryan, or Patti Bauer-Craig. Nor did Respondent produce any of those individuals as witnesses to deny or contest the testimony of any of the employees who did appear. Accordingly, I infer that each of the conversations testified to did occur as recited *supra*. I find, therefore, that in each instance at least one of Respondent's agents or supervisory personnel told the employees who testified that the only method of "transferring" to the new Post Street Gucci store was to resign from their current position and apply as a new hire.

### 3. Subsequent events

Union Representative Monihan testified to a meeting she had with Harmon Tobler in January 1979. Tobler, now the president and chief executive officer of Respondent, was at the

time of the meeting the vice president for personnel and sales development. Monihan testified that at this meeting, ostensibly held for the purpose of discussing the grievance of one Dorothy Patton, she brought up the subject of transfers. She testified that she told Tobler that the Company should not have a policy against transfers. Tobler's response, according to Monihan, was that Respondent would not have the no-transfer policy were it not for the pending dispute over the Post Street Gucci shop. Tobler disputed Monihan's account of their conversation in his testimony. He denied having stated there would not be a no-transfer policy but for the Gucci dispute and the forthcoming arbitration of that dispute; he maintained that his sales management philosophy favored salespeople's building a personal clientele and thus disfavored transfers between stores. Both witnesses appeared to testify in a straight forward, candid manner. Nonetheless, Monihan's testimony regarding the conversation was precise and unwavering on both direct and cross-examination, while Tobler's testimony on the point consisted of brief four-word answers to leading questions on direct examinaiton. Notwithstanding Tobler's apparently rational business justifications for disfavoring a policy permitting transfers, and even though I am aware of the dangers inherent in the fact that Monihan's testimony is quite self-serving, the form of their respective testimony leads me to credit Monihan's version as the more accurate. Furthermore, I believe that my conclusions regarding the no-transfer policy as a whole, *supra*, serve to bolster my judgment on this particular credibility issue.

Sometime during the spring of 1979 the Union learned of a job opening at Respondent's store on Montgomery Street in San Francisco. Union Representative Monihan accompanied Sarah Hill and Rosa Bullock, both of whom had been laid off previously, to the Montgomery Street store to inquire of Store Manager Michael Richards about the opening. When the threesome met Richards, according to Monihan:

> Sarah asked Mr. Richards would he let her work there, would he let her transfer there, and Mike said I'd love to have you work for me, Sarah. You're a fantastic worker, I know you from when I used to work over at the Harrison Street building. But there is a policy in the union stores that the company won't let people transfer. He said I don't

> know why they have that policy, it's only in the union stores.

Richards denied saying that the no-transfer policy applied "only in the union, stores," but he did admit, "I said within the city [of San Francisco] stores." Richards then attested to his knowledge that Respondent's no-transfer policy applied throughout the Joseph Magnin system, but subsequently again testified that, when Monigan and the two employees had asked about transfers and where the policy applied, "I said the city stores." Richards then testified that, despite the applicability of the policy to all Joseph Magnin stores, "within the city San Francisco stores we have a special situation because we are a union operation." He testified that the situation was "special" only becuase of the fact that all of Respondent's San Francisco stores and the COB are covered by union contracts while none of its other stores are unionized. Taken in whole, I find Richards' testimony to be less than forthright. While he frankly admitted to having told the employees and Monihan that the no-transfer policy applied "within the city stores," the rest of his testimony seemed to be designed in some way to cover tracks. While Richards may not have said that the policy applied "only in the union stores," it is clear that he did say "within the city stores"—the unmistakable implication being that the policy applied exclusively to the city stores, which in fact are the only union stores. Accordingly, I lend more credence to Monihan's version of the conversation.

### 4. Analysis and conclusions

The facts of the instant case must be analyzed under the basis of the Board's recent decision in *Wright Line, a Division of Wright Line, Inc.*, 251 NLRB 1083 (1980), wherein the Board formally established "a test of causation for cases alleging violations of Section 8(a)(3) of the Act." That test calls for counsel for the General Counsel to "make a *prima facie* showing sufficient to support the inference that protected conduct was a 'motivating factor.' " Once that initial showing has been made, "the burden [shifts] to the employer to demonstrate that the same action would have taken place even in the absence of the protected conduct." *Wright Line, supra* at 1089.

However, before proceeding to a discussion of this case under the *Wright Line* analysis, I must deal with the Charging Party's motion to defer to the award of Arbitrator Grodin, which award underlies in many respects the instant litigation. The Board's decision in *Spielberg Manufacturing Company*, 112 NLRB 1080 (1955), indicates that, where "the proceedings appear to have been fair and regular, all parties had agreed to be bound, and the decision of the [arbitrator] is not clearly repugnant to the purposes and policies of the Act," the Board will defer to an arbitrator's award. *Spielberg, supra* at 1082. The so-Called *Spielberg* doctrine was recently enhanced by the Board in *Suburban Motor Freight, Inc.*, 247 NLRB 146 (1980), wherein the Board stated, "[W]e will no longer honor the results of an arbitration proceeding under *Spielberg* unless the unfair labor practice issue before the Board was both presented to and considered by the arbitrator." *Suburban Motor Freight* further requires that "the party seeking board deferral to an arbitration award . . . prove that the issue of discrimination was litigated before the arbitrator." *Id.* at 147.

In light of the above-enumerated standards, my examination of the arbitration establishes that the arbitrator's award herein is entitled to great weight. Arbitrator Grodin found that:

> . . . the Employer's no-transfer rule operated to preclude union employees from transferring from Store #1 to Post Street in part precisely because they are union employees and, therefore, to discriminate against them "on account of membership in . . . the Union" in violation of Section 3A of the agreement.

The arbitrator reached this determination after consideration of much of the same evidence that was presented in the instant litigation. Further, he followed the procedure which would be used in any Board determination following *Wright Line, supra:* He found first that the evidence presented by the Union was "sufficient to establish a *prima facie* case of improper motivation"; he then found not only that because of "significant gaps in the Employer's case" Respondent had failed to rebut the Union's initial showing, but also that the reasons adduced to justify the no-transfer policy failed to provide such a rebuttal. Finally, the arbitrator indicated that in rendering his award he

relied by analogy on the policies of the Act as interpeted by the Board; my reading of the award confirms this assertion, no contrary showing has been attempted, and I find that, in accordance with *Spielberg*, arbitrator Grodin's decision "is not clearly repugnant to the purposes and policies of the Act" but that in fact it effectuates those policies.

Even were I not to place such great weight on the findings and conclusions of the aribtrator, I find that, in accordance with *Wright Line, supra*, counsel for the General COunsel has made a *prima facie* showing of improper motivation which Respondent has failed to rebut. This conclusion is based upon the following factors:

Internal correspondence between top management officials in the fall of 1977 shows that Respondent was interested in cutting commissions and labor costs incurred via the sale of Gucci products. The director of labor relations at that time, however, noted that the Union presented an obstacle to those interests. I infer that also at or about this time Respondent was involved in business negotiations and planning for the freestanding Gucci store on Post Street because the agreement between Joseph Magnin and Gucci regarding that store was executed within the next 5 months. A March 15, 1978, memorandum of Maria Manetti, then the director of Gucci operations for Respondent, extolled the virtues of operating an exclusive "quality" specialty shop without a union; labor costs could be significantly reduced and there would be no restrictions on "the freedom of management policies." Then President Raskin testified that the decision to open Post Street nonunion was not based solely on the Manetti memorandum; yet, he admitted that, at the time the decision was being made, Manetti's recommendations formed at least part of the decision-making process. Indeed, Raskin testified that Manetti was only "one of many" involved in the decision who advocated opening the Post Street Gucci store on a non-union basis.

In view of Respondent's expressed desire to open its Gucci store on Post Street sans a union, I find that from February 1977 until Post Street opened in November 1978, the following scenario occurred: Respondent decided not to extend automatically the Union's contract to its new Embarcadero store, a

break from its apparent past practice (the contract was automatically applied when the Stonestown, Fox Plaza, and Montgomery Street stores opened, respectively). In an apparent effort to dissuade the Union from obtaining a majority at the Embarcadero Store, it prevented at least four union employees at San Francisco stores from transferring there while at the same time permitting at least three nonunion employees from the Oakland store to so transfer. This occurred in conjunction with the announcement, for the first time, of a policy prohibiting the interstore transfer of hourly employees. After the Union disputed this policy, and contemplating the opening of its Post Street Gucci store, Respondent actually promulgated its "long-standing" no-transfer policy; I think it is no coincidence that the policy was promulgated at or about the same time that planning was under way for the Post Street Gucci store, *viz*, during the fall of 1977. I find it significant that, as discussed *supra*, no one was called who testified (or who could have testified) as to the original reasons for promulgating the no-transfer rule; nor were the rule's antecedents (if any) produced, and I infer that, prior to the Embarcadero dispute (and its culmination in the promulgation of the no-transfer rule on September 26, 1977), no policy specifically prohibiting interstore transfers existed. *Colorflo Decorator Products Inc.*, 228 NLRB 408 (1977). Thereafter, with its no-transfer policy in hand and intending to open a nonunion store, Respondent through its agents and supervisors told any and all of its San Francisco employees who, upon learning of the plans for the Post Street Gucci store, sought to transfer to that facility that they could not do so unless they quit their current employment with Joseph Magnin.

I find this quit-and-reapply requirement to be remarkably similar to that found in *Coated Products, Inc.*, 237 NLRB 159 (1978). While that case involved the closing entirely of one plant and the subsequent reopening of a new one, the remaining facts are quite relevant to the situation herein. Employees at the old plant who desired to be transferred to the new one were required to resign from their positions and make new applications; this requirement was imposed even though there had been no change in the corporate structure of the employer. In addition, nonunit employees were permitted to transfer to the new plant without inhibition. Those factors, along with other evidence

tending to show union animus, led to the conclusion that the respondent sought to "depress the union component in the employee population at [the old plant]." *Coated Products, supra* at 167. Accordingly, Respondent's failure to permit transfers to the new facility was found to be a violation of Section 8(a)(3). *Coated Products* is quite instructive with regard to the present case. Herein employees of the San Francisco stores were required to resign and reapply to effect a transfer despite the fact that the Post Street Gucci Store is owned and operated by Respondent. In addition, there is some evidence herein of at least inconsistent application of Respondent's claimed no-transfer policy and clearly the fact that Respondent sought to operate the Post Street Gucci store without having to deal with the Union cannot be disputed.

Several additional factors support these conclusions. In January 1979 then Vice President Tobler told Monihan that there would not be a policy prohibiting transfers but for the pending Gucci dispute. While Tobler denies this assertion, I have credited Monihan's account. A few months later, the Montgomery Street store manager, Richards, told two employees seeking a transfer to his store that company policy prohibited such transfers in the San Francisco stores, the only stores in Respondent's chain which are unionized. He may even have said that the policy applies only in the union stores. In any case, it is clear from my findings, *supra*, that he did not know why the policy existed, but knew only that he was not to permit union member employees to come from another store to the one he managed. Finally, on at least three occasions Respondent attempted to conceal its plans for the Post Street Gucci store in an effort to prevent employees from seeking transfers to what it hoped would be a nonunion shop. It told union representatives in October that Gucci was a separate employer, even though Respondent owns and in every respect operates the Post Street Gucci store. Its advertisement soliciting applicants for the Post Street Gucci store bears no identification of the owner/operator of that shop,[7] and it attempted to conceal artists' rendering of

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[7]Cf. *Karl Kallman d/b/a/ Love's Barbeque Restaurant No. 62; Love's Enterprise, Inc.*, 245 NLRB 78, fn. 10 (1979), a successorship situation in which hiring was concealed from the union and its members in part by use of an "unmarked" newspaper advertisement.

the proposed Gucci shop from union representatives during a board of adjustment meeting.[8]

In summary, therefore, I conclude that the findings and award of the arbitrator are entitled to great weight. I conclude that even absent consideration of the underlying arbitration the General Counsel has established a *prima facie* case supporting an inference of unlawful motivation and that Respondent has failed to rebut this showing. Accordingly, I find and conclude that by adopting its policy prohibiting the interstore transfer of hourly employees and by prohibiting the transfer of such employees to its Post Street Gucci store because of their union affiliation and because of its desire to run Post Street nonunion, Respondent has violated Section 8(a)(3) and (1) of the Act.

### B. *The 8(a)(5) Allegations*

The complaint alleges that but for the unfair labor practices of Respondent, as found *supra*, the Union would have represented a majority of Respondent's employees at its newly opened Post Street Gucci store. The complaint further alleges that since on or about October 1978 Respondent has unlawfully refused to recognize the Union as the bargaining representative of its employees at Post Street.[9] For the reasons that follow, I conclude that these allegations that the Respondent has violated Section 8(a)(5) of the Act lack substantial merit.

The Union claims representative status on the basis of section 1 of the parties' collective-bargaining agreement. The parties have stipulated and the arbitrator found that section 1 is

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[8] As to this latter point, Respondent called no witnesses to testify as to this occurrence. I infer that it happened according to the account of the witness for the General Counsel. *Colorflo Decorator Products, supra* at 410.

[9] I find that, insofar as it is relevant, the Union first requested recognition as representative of the Post Street employees on September 12. On that date Union President Walter Johnson wrote to Elsa Lane requesting extension of the contract to the new facility by operation of sec. 1 of that agreement. In that letter, he also requested an adjustment board meeting to discuss the transfer issue. The record makes no clear mention of any subsequent recognition demands; presumably, such a demand was renewed at the board of adjustment meeting in October, and hence the date of refusal to recognize which is recited in the complaint.

a valid "after-acquired-stores" or additional stores clause under Board law. *Houston Division of the Kroger Co.*, 219 NLRB 388 (1975). Under *Kroger*, the Board construes such clauses to be contractual waivers of an employer's right to petition for a Board election upon a request for recognition; but *Kroger* and its progeny also clearly show that such clauses require recognition only upon proof of majority status by a union. As the Board stated, in a situation such as the instant one:

> [t]he principles of accretion do not resolve the issue . . . inasmuch as the stores in question have a sufficient separate existence to constitute separate appropriate units. . . . [T]he Board has held that "additional store clauses" are valid in situations where the Board is satisfied that the employees affected are not denied their right to have a say in the selection of their bargaining representative. [*Kroger, supra.*]

I can find nine employees of Respondent who, at the very least, expressed some interest in transferring from their jobs to positions at the new Post Street facility. Thus, Christine Azzopardi went so far as to attempt to complete an application form and obtain an interview. Margaret McCoy initiated the grievance over the transfer issue that resulted in the arbitration by Professor Grodin. Lewis Silcox, Howard Ferrier, Mikio Hirata, and Cheryl Austin individually consulted supervisors or personnel officers about the possibility of transferring; each was told they would not be able to do so without resigning, and I find, accordingly, that Respondent discouraged each of them from even attempting to apply. Employee Austin then transmitted the substance of her conversations to employees Lewis Rusel, James Murphy, and Jack Smith; Rusel testified that consequently he was discouraged from attempting to apply for a transfer, and I conclude that Murphy and Smith were similarly so discouraged. Various of the employee witnesses testified that other of their fellow employees were discouraged from inquiring about transfers, to Post Street; but since no others were named or testified, I may not include them in that class of employees who have at least expressed an interest in transferring. Similarly, while Terry Dean and Geraldine Korss accompanied fellow employee Margaret McCoy to the October 10 board of

adjustment meeting where McCoy's transfer grievance was discussed, to conclude that their presence at that meeting indicated an interest in transferring would be an impermissible indulgence in speculation.

Neither the complaint nor the brief from counsel for the General Counsel make any allegation as to the employee complement at the Post Street Gucci store. Nor is there any testimony giving an exact indication of the size of that complement. My review of the business documents placed in evidence indicates that Respondent opened the Post Street Gucci Store in November with 21 employees. From that time until the selling period ending April 7, 1979, I cannot determine that the number of employees ever dropped below 18. Under such circumstances, even had all nine been permitted to transfer, a majority would not have been obtained.[10]

Furthermore, counsel for the General Counsel has adduced no evidence that, even absent Respondent's discriminatory no-transfer rule, all nine of the above-mentioned employees would have transferred to Post Street. There is no showing that any or all of them had acquired sufficient seniority under the contract. Nor does the record show whether, following any reduction in the size of the employee complement, any or all of the nine had seniority sufficient to cause their retention at Post Street.

Consequently, the requirements of *Kroger* have not been fulfilled—the Union did not offer and I find that it would have been unable to submit proof that it represented a majority of the employees at the Post Street Gucci store. Under this standard, then, the additional stores clause could not operate to apply the parties' collective-bargaining agreement to that facility.

Nonetheless, counsel for the General Counsel urges that a bargaining order should issue. He argues, by analogy to a line of

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[10]In its brief the Charging Party, after its own analysis of Respondent's productivity reports, avers that "the normal complement of selling employees is approximately 16," and that, according to Respondent's testimony, the Post Street employee complement also included 2 to 3 stock employees. The Union's claim of majority status cannot be based on an average number of employees for the year nor on its own assertion of the "normal complement," for the fact remains that, according to this record, it could not have had a majority at the time or soon after it requested recognition. Furthermore, my conclusions *infra* apply here as well.

the board's successorship cases,[11] that but for Respondent's unfair labor practices under Section 8(a)(3) the Union would have had a majority at the Post Street Gucci store; that uncertainties in ascertaining whether a majority existed at the Post Street Gucci Store, being uncertainties which have arisen due to Respondent's unlawful conduct, must be resolved against the wrongdoer; and that the wrongdoer must not be permitted to benefit from its illegal acts. While at first blush this argument is quite attractive, I find that the reliance of counsel for the General Counsel on these successorship cases is inapposite.

First, all of the cases cited by counsel for the General Counsel may be distinguished factually. In each case the successor employer refused to rehire the employees of its predecessor in an already established bargaining unit. In this case there is no preexisting bargaining unit. Obviously, Post Street is a new facility; indeed, under the principles of both *Kroger, supra*, and the Board's accretion decisions, Post Street is of arguably sufficient separate existence to constitute a separate appropriate unit. Cf. *W. C. DuComb West A Division of W. C. DuComb Co., Inc.*, 239 NLRB 964 (1978), and cases cited therein.

An even greater distinction, however, is the fact that in each of the successorship cases the union majority was clearly established before the business involved changed ownership. Here, of course, no previous majority status was or could have been shown.

Of paramount importance is the right of all of the employees at the Post Street Gucci store "to have a say in the selection of their bargaining representative." *Kroger, supra.* The granting of a bargaining order in this instance, requiring Respondent to recognize the Union as the exclusive representative of its Post Street employees, may operate to effectively disenfranchise those employees by reason of a contract (and its additional stores clause) for which they did not bargain. CF. *Melbet Jewelry CO., Inc., and I.D.S.—Orchard Park Inc.*, 180 NLRB 107, 109 (1969).

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[11] *Foodway of El Paso. A Division of Kimbell Foods, Inc.*, 201 NLRB 933 (1973), *Crawford Container, Inc.*, 234 NLRB 851 (1978); *Karl Kallman d/b/a/ Love's Barbeque Restaurant No. 62, supra.*

A useful analogy may be drawn here to cases where the Board has issued bargaining orders in the context of a union's organizational campaign. In those exceptional cases marked by pervasive and outrageous employer unfair labor practices, a bargaining order may properly issue, but only where the employer's illegal conduct has dissipated the union's majority. *N.L.R.B. v. Gissel Packing Co., Inc.*, 395 U.S. 575 (1969). Thus the bargaining order is a remedy designed to restore the *status quo ante*. However, where, as herein, the union has never obtained a showing of majority support—indeed, the Post Street employees have apparently never had any opportunity to demonstrate one way or another their sentiments regarding the Union—a bargaining order does not serve to restore the *status quo ante*. *United Dairy Farmers Cooperative Association*, 242 NLRB 1026 (1979).

The Board concluded in *United Dairy Farmers, supra*, that the imposition of a bargaining order in a case where no majority support was shown, and even where the employer's 8(a)(3) and (1) violations precluded an unencumbered election, presented a substantial risk of imposing a union on nonconsenting employees. No substantial remedial interest was found to justify imposition of such an order. I think that the same risks—of imposing the Union on nonconsenting employees—are attendant in this case. Further, I do not think that the unfair labor practices herein are so pervasive and egregious as to prevent a free and fair election, should either of the parties petition for one.

Thus, I conclude that *Kroger* and *United Dairy Farmers* may be taken together to find that, under circumstances such as those herein, an additional stores clause cannot apply absent a showing of majority status, nor will an "anticipatory" majority be presumed so as to deny employees of a new, arguably separately appropriate unit or facility an opportunity to choose a bargaining representative.

Accordingly, I conclude that the evidence fails to show that Respondent has violated Section 8(a)(5) of the Act.

## V. THE EFFECT OF THE UNFAIR LABOR PRACTICES UPON COMMERCE

The activities of Respondent Joseph Magnin Company, Inc., set forth in section IV, A, above, occurring in connection with the operations of Respondent described in section I, above, have a close, intimate, and substantial relation to trade, traffic, and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

## CONCLUSIONS OF LAW

1. Joseph Magnin Company, Inc., is an employer within the meaning of Section 2(2) of the act engaged in a business affecting commerce within the meaning of Section 2(6) and (7) of the Act.

2. Department Store Employees Union, Local 1100, United Food and Commercial Workers International Union, AFL-CIO, is a labor organization within the meaning of Section 2(5) of the Act.

3. At all times material herein the Union has been the exclusive representative of all of the San Francisco employees of Respondent, as designated in section 1 of the parties' collective-bargaining agreement and the appendixes thereof, except for those employees employed by Respondent at its Gucci store at 253 Post Street, San Francisco, California.

4. By adopting a no-transfer policy for its hourly employees designed to discriminate against employees on the basis of their union affiliation and by refusing to permit interstore transfers of employees because of their union affiliations, Respondent Joseph Magnin Company, Inc., has violated and is violating Section 8(a)(3) and (1) of the Act.

5. The aforesaid unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

6. Respondent Joseph Magnin Company, Inc., has not violated the Act in any other manner.

## THE REMEDY

Having found that Joseph Magnin Company, Inc., has engaged in certain unfair labor practices, I shall recommend that it be ordered to cease and desist therefrom, and that it take certain affirmative action designed to effectuate the policies of the Act. With regard to the latter, I note first that the Charging Party has alleged that employees of the Store 1 Gucci department lost earnings as a result of the Post Sreet opening and the prohibition against their transfer there. I note also that this allegation was made in the arbitration proceeding, and that Arbitrator Grodin was unable to reach a definitive conclusion on its merits. In this light, I find that determinations regarding any backpay owed discriminatees herein may be deferred to the compliance stage of this proceeding. For as Mr. Justice Frankfurter noted in his concurring opinion in *N.L.R.B. v. Deena Artware, Inc., et al.*, 361 U.S. 398, 412 (1960), the separation of the finding that an employer's conduct violated the Act from the determination of the amounts of backpay owing is "an eminently reasonable method for administering the Act." See also *The Torrington Company v. N.L.R.B.*, 545 F.2d 840, 842 (2d Cir. 1976), and *The Florsheim Shoe Store of Pittsburgh, Pennsylvania, et al. v. N.L.R.B.*, 556 F.2d 1240, 1247 (2d Cir. 1977), for cases where issues involving the scope of the remedy were deferred to the compliance stage. Therefore, it is unnecessary at this point to determine precisely the employees so affected according to the Charging Party's allegations and the amounts of backpay to which each may be entitled. Similarly, I defer the determination of precisely which employees would have been transferred but for the unlawful discrimination to the compliance stage of this proceeding.

Having found that Respondent illegally refused to transfer union members to its Post Street facility, I shall recommend that Joseph Magnin Company, Inc., be ordered to offer immediate transfer to those employees who would have transferred but for the unlawful discrimination, as determined in the compliance stage of this proceeding, to the Post Street Gucci store, without prejudice to their seniority or other rights or privileges, dismissing, if necessary, anyone who may have been hired or assigned to perform the work to which the discriminatees would have been assigned. Additionally, Joseph Magnin Com-

pany, Inc., will be required to make whole any such discriminatees for any loss of earnings they may have suffered by reason of the unlawful refusals to transfer with interest on the amounts owing to be computed in the manner prescribed in *Florida Steel Corporation*, 231 NLRB 651 (1977), and with deductions for interim earnings as prescribed by *F. W. Woolworth Company*, 90 NLRB 289 (1950). See, generally, *Isis Plumbing & Heating Co.*, 138 NLRB 716 (1962), enforcement denied on other grounds 322 F.2d 913 (9th Cir. 1963).

[Recommended Order omitted from publication.]

San Francisco, CA

UNITED STATES OF AMERICA
BEFORE THE NATIONAL
LABOR RELATIONS BOARD

JOSEPH MAGNIN COMPANY, INC.

and

DEPARTMENT STORE EMPLOYEES UNION, LOCAL 1100, UNITED FOOD AND COMMERCIAL WORKERS INTERNATIONAL UNION, AFL-CIO

Case 20-CA-14321

## ORDER DENYING MOTION

On August 10, 1981, the National Labor Relations Board issued a Decision and Order in the above entitled proceeding,[1] finding that Respondent has engaged in certain unfair labor practices in violation of Section 8(a) (3) and (1) of the National Labor Relations Act, as amended, and ordering that Respondent cease and desist therefrom and take certain affirmative action to remedy such unfair labor practices.

Thereafter, on September 2, 1981, Respondent filed a Motion for Reconsideration, contending (1) that the Board's record does not support the finding that Respondent violated the act as alleged; and (2) that the remedy imposed upon Respondent is overbroad and unduly punitive. On September 8, 1981, the Charging Party filed a response to motion for reconsideration, and on September 14, 1981, the General Counsel filed an Opposition to motion for reconsideration.

The Board having duly considered the matter,

IT IS HEREBY ORDERED that Respondent's motion for reconsideration be, and it hereby is, denied as lacking in merit and containing nothing not previously by the Board.

Dated, Washington, D.C., September 18, 1981.

By direction of the Board

Joseph E. Moore

Associate Executive Secretary

[1] 257 NLRB No. 86 (1981).

**IN ARBITRATION PROCEEDINGS PURSUANT TO THE COLLECTIVE BARGAINING AGREEMENT BETWEEN THE PARTIES**

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| In the Matter of a Controversy between DEPARTMENT STORE EMPLOYEES UNION LOCAL 1100, *Complainant* and JOSEPH MAGNIN, *Respondent* Involving the issue of transfer of Gucci employees. | OPINION AND AWARD JOSEPH R. GRODIN Arbitrator [Dated July 16, 1979] |

## I. INTRODUCTION

The issues to be determined in this arbitration are: (1) Whether the employees employed in the Gucci Department of Joseph Magnin's San Francisco Department Store may transfer to the Gucci Shop owned and operated by Joseph Magnin at 153 Post Street, San Francisco, pursuant to the Collective Bargaining Agreement between the parties; and (2) if so, what remedy is appropriate.

These issues arose in the fall of 1978 when the Union became aware that Joseph Magnin (hereinafter "Employer") intended to open a "Gucci Shop" on Post Street, for the purpose of selling merchandise manufactured by the Gucci firm in Florence, Italy, and distributed in this country through a U.S. corporation, Gucci Shops, Inc. For some years the Employer had sold Gucci merchandise at its O'Farrell Street store through a separate department, or "boutique," at that location. On October 19, 1978, Union representatives met with Employer representatives and requested that employees from the O'Farrell

Street store be permitted to transer to the new location. That request was denied, the Employer asserting that it had a policy against interstore transfers. The following day Christine Azzopardi, an employee in the Gucci boutique of the O'Farrell Street store, attempted to make application for employment at the new Gucci Shop and was informed that her application would be considered only if she first resigned her current job. Thereafter the Union sought relief by filing a charge under Sections 8 (a) (1) and (5) of the National Labor Relations Act with the National Labor Relations Board, and by requesting arbitration.

The Union's charge with the NLRB asserted that the Employer had violated its agreement with the Union by failing and refusing to allow employees in the Gucci department at the O'Farrell Street store to transfer in accordance with their seniority, that it had violated the Act by failing and refusing to proceed to arbitration on the matter of transfer rights, and that these actions were part of a calculated attempt to deny employees their transfer rights under the agreement and to impair their selection of the Union as their bargaining representative. On December 27, 1978, the Employer filed an "RM" Petition with the NLRB, seeking an election at the Post Street store. The NLRB, pursuant to its standard procedures, considered that petition to be "blocked" by the Union's charge; and on January 26, 1979, the 20th Region of the NLRB deferred proceedings on the charge pending arbitration, pursuant to the policy enunciated by the NLRB in *Dubo Manufacturing Corporation*, 142 NLRB 431.

Meanwhile the Employer refused the Union's request to arbitrate the matter, and the Union filed a petition to compel arbitration in the Superior Court of the City and County of San Francisco. On January 25, 1979 Judge Ira Brown signed an order directing:

> ". . . that respondents proceed forthwith, in the manner provided in the written collective bargaining agreement . . . to arbitrate before the impartial arbitrator, Joseph Grodin, the issue of whether the employees employed in the Gucci Department of Joseph Magnin's San Francisco department store may transfer to the 'Gucci' shop owned and operated

by Joseph Magnin at 253 Post Street, San Francisco, pursuant to the collective bargaining agreement between Petitioner and Respondents."

Arbitration hearings were conducted in San Francisco for three full days on April 27, April 29, and May 4, 1979. The Union was represented by Attorneys Roland C. Davis, Robert P. Cowell and Nancy S. Roberts of the firm Davis, Cowell, & Bowe, and the Employer by Charles B. Waud of the firm Conhain & Associates, Inc. More than 125 exhibits were introduced, ten witnesses testified, and a court reporter produced 265 pages of transcript of the proceedings. Both parties filed lengthy briefs on July 2, 1979, and the matter is ripe for determination.

## II. RELEVANT CONTRACTUAL PROVISIONS

"**Section 1. Recognition**

The Union is recognized as the sole collective bargaining agent for all employees employed at the San Francisco stores and Central Office Building of JOSEPH MAGNIN except for executives as defined in Section 2 (Definition of Executives) and for the classifications listed in Appendix A.

**Section 3. Union Membership**

A. There shall be no discrimination by the Employer against any employee or applicant on account of membership in or activity on behalf of the Union.

**Section 5. Union-Employer Relations**

B. Any act of the Employer, representative of the Union, or any employee that is interfering with the faithful performance of this Agreement, or a harmonious relationship between the Employer and the Union, may be referred to the Adjustment Board for such action as the Adjustment Board deems proper, and is permissive within this Agreement.

**Section 19. Seniority**

A. The Employer is obligated to recognize the principle of seniority in laying off or rehiring employees. The principle of seniority shall prevail and control in such layoffs or rehiring where, in the judgment of the Employer, merit and ability are equal. In exercising such judgment, the Employer is obligated to do so fairly, reasonably and impartially, and is further obligated to take into consideration the relative merit and ability of employees with experience in the same type or types of work, and such consideration shall not be limited to the employees in a particular department affected.

B. When an employee is transferred from one department to another, he shall not lose, but shall retain all seniority rights. It is agreed that employees shall not be transferred from a higher to a lower paying classification unless such transfer is brought about by layoff or reduction in work force, or unless such transfer is mutually agreeable to the Employer and the employee.

**Section 27. Demonstrators, Leased and Sub-Leased Departments and Cosmetic Salespeople**

B. The provisions of this Agreement shall apply to all departments leased or sub-leased to others.

**Section 40. Transfer and Removal of Work**

No work now being performed by employees within the bargaining unit shall be transferred or removed from the bargaining unit without at least sixty (60) days advance written notice to the Union affected, by certified or registered mail, setting forth the nature of such intended

change(s), date of such change(s), and whether the change involves the elimination of a work or departmental operation or a change in method of operation wherein present bargaining unit employee's job or position would be eliminated. In those situations where the change results in the elimination of entire departments or work operations, or individual job functions within a department, the Employer shall provide whatever training necessary to place the affected employee(s) in other available positions regardless of classification. In such situations, the affected employee(s) shall have the option of accepting the available position or of going on layoff status.

In those situations cited above if the Union has served on the Employer within seven (7) days of receipt of the above-mentioned Employer notice, the parties shall meet as soon as possible to discuss the effects of such above-mentioned changes on the bargaining unit employees. Grievances by employees regarding the effects of the change(s) will be subject to all of the provisions of Section 35.

## III. SUMMARY OF CONTENTIONS

### A. Union Contentions

1. Gucci and Joseph Magnin should be regarded as a single entity for purposes of the contract, in accordance with applicable federal principles, *Parklane Hosiery Co.*, 203 *NLRB* 597 (1973), which have in turn been adopted by arbitrators, *e.g.*, *W.A. Foote Memorial Hospital, Inc.*, 66 LA 24, 27 (Keefe, 1976). The Gucci shop is a wholly owned division of the Employer; the Employer has total control over its operations except for certain matters relating to merchandising appearances and advertising; its employees were hired and trained by the Employer, are paid by the Employer, and receive the same fringe benefits and employee discount privileges as other Magnin employees; their day-to-day supervision is supplied by a store manager who is a Magnin employee and who reports to

the Magnin supervisor for the San Francisco region; merchandise pricing and delivery is done by Magnin employees, some of whom travel to the Gucci shop for that purpose; Magnin employees visit the Gucci shop to pick up merchandise, and Gucci shop employees transfer nonsales work to the O'Farrell employees; and Gucci operations are recorded in the Magnin computer.

2. The O'Farrell Street Gucci employees have a contractual right to transfer to the Gucci shop. The Gucci shop is a "San Francisco store of Joseph Magnin" within the meaning of Section 1 of the agreement, and therefore part of the bargaining unit. The right and ability of Magnin employees to transfer within the Union's jurisdictional area is recognized in Section 19(b) of the agreement. And such right is established through past practice of allowing transfers at the employee's request.

3. The Employer has discriminated against Union employees in the assignment of work, in violation of Sections 1 and 3A of the agreement. The denial of transfer was not undertaken in good faith but because the employees were Union members. Clauses such as the one contained in Section 1 have frequently been interpreted to grant the contracting union jurisdiction over any fairly claimable work in the geographic area covered by the agreement. *E.g., Ethyl Corporation*, 68-1 ARB Par. 8360 (Dworkin, 1968); *Department Store Employees Union Local 1100 and White Front San Francisco, Inc.* (Harley) (unpublished opinion furnished by the Union, the rationale of which the Union asserts was adopted by the NLRB at 203 NLRB 548 (1973); *Department Store Employees Local 1100 and the Emporium, Cow Palace Sale* (Barsamian) (unpublished opinion furnished by the Union)). The Employer's actions are nothing more than an attempt to "stack the deck" with non-union, or perhaps even antiunion, employees. Such conduct has been held unlawful by the NLRB in cases such as *Coated Products, Inc.*, 237 NLRB No. 14, 99 LRRM 1540 (1978).*

4. By way of remedy, the Arbitrator should order the Employer to allow the seven Gucci Sales people currently employed at O'Farrell to transfer to the Post Street shop if they desire; to allow any Magnin sales person with the requisite

*In its opening statement the Union relied upon contract sections 27 and 40, but does not refer to these sections in its brief.

seniority and ability to request transfer; and to make the O'Farrell Gucci sales people whole for lost commissions.

## B. Employer Contentions

1. Even if employees had a right to transfer from one Magnin location to another covered by the agreement, the Gucci shop is not covered by the agreement. Section 1 should not be interpreted as an "accretion" clause, providing automatic coverage at new locations; and applicable NLRB principles preclude giving it that effect under the circumstances. It is located in a physically separate and distinct facility; it is functionally distinct in terms of financial accounting and employee supervision; there has been no transfer or interchange of employees; the Employer has never waived its right to insist upon an NLRB election as a way of testing the Union's claim to majority status; and the Union makes no claim to actual authorization by the Gucci store employees as their bargaining representative.

2. In any event, nothing in the agreement provides for a right to transfer from one store to another. Nothing in Section 1 grants that right. Section 19B speaks only in terms of transfer from one department to another, and even if the Post Street store were deemed a "department" of the O'Farrell Street store (which the Employer says it is not) that section makes no mention nor provision for *intra*-departmental transfers, which is what a transfer from Store 1 to the Post Street store would have to be. Moreover, Section 19B speaks only of transfers, not of requests to transfer, thereby negating the argument that it allows transfers at the employee's request. Nor is the Post Street store a "leased" or "subleased" department within the meaning of Section 27B.

3. The parties' past practices with regard to employee transfers does not establish an employee's right to request and be granted a transfer from one company location to another.

4. The Post Street store is a separate and distinct unit, appropriate for purposes of collective bargaining. (This contention appears to be closely related to the first contention.)

5. The Employer did not discriminate against Store 1 employees in violation of the agreement. The Employer had no

obligation under the agreement to permit them to transfer. No employees from other stores, whether union or nonunion, were permitted to transfer. The company's policy in not permitting transfers was based upon reasonable and solid business considerations.

## IV. SUMMARY OF EVIDENCE

### A. The Employer's Operations in General

Joseph Magnin is a California corporation engaged in the retail sale of men's and women's clothing and accessories. Since its founding it has undergone three changes in ownership: originally a family corporation, it was sold to AMFAC (a corporate conglomerate), and AMFAC in turn sold it to a Delaware corporation called New Magnin. The dates of these transactions are unclear from the record.

The Employer's headquarters are located at 59 Harrison Street in San Francisco in a building known as the Central Office Building ("COB"), where approximately 300 workers are employed. It operates five stores in San Francisco: O'Farrell Street (Store No. 1); Montgomery Street, Fox Plaza, Embarcadero, and the Gucci store on Post Street which is at issue here. All stores other than the Gucci store are covered by the current agreement between the Employer and the Union. Collectively, they employ about 200 persons. The Employer also operates stores outside of San Francisco, including stores in Oakland which are nonunion.

### B. Collective Bargaining History

Prior to 1970, the Employer was a member of Retailers Council, and employer association, and bargained with the Union on the basis of a multiemployer unit which included several other retail department stores. The agreement applicable to the multiemployer unit contained language identical in all relevant respects to Section 1 of the current agreement between the parties. It is undisputed that under that agreement it was the practice that when a new department store or branch store was opened in San Francisco by an employer party to the multiemployer agreement, the contract would automatically apply. The Employer followed this practice when it opened its stores at Stonestown, Montgomery Street, and Fox Plaza.

One of the principal parties to the Retailers Council agreement, The Emporium, withdrew from the multiemployer unit prior to the 1970 negotiations; and prior to the expiration of the agreement negotiated in that year the other employer members withdrew as well. Since that time, the Employer has bargained with the Union independently. A 1975-1978 agreement has been continued, with modifications, for an additional three-year period.

In 1974, the Employer leased the first floor of the old City of Paris building, about a block away from the O'Farrell Street store, for an operation known as "Magnarama." Magnarama was a discount operation, involving the sale of marked-down or sales items. Prior to 1074 it had been conducted on the sixth floor of the O'Farrell Street store. When it was moved to the City of Paris building, some of the O'Farrell Street store employees moved with it. The agreement was applied to employees in the Magnarama operation at the City of Paris building.

In 1977, the Employer opened a new store in San Francisco at Embarcadero Center. The Employer declined to recognize the Union at the new location. The Employer in its brief says that "the Company, by then under new ownership, had reassessed its position and declined to recognize the Union without an election." The Employer filed an RM petition with the NLRB, which the Union blocked by filing a refusal to bargain charge. The NLRB regional office dismissed the Union's charge, and the Union appealed. The Director of Appeals upheld the dismissal in a letter stating in part:

> "Even assuming that the clause in the existing contract (Section 1, Recognition), could be construed as an 'after acquired store' clause requiring the Embarcadero to be considered as part of the San Francisco multi-store unit, in view of the absence of a showing by the Union that it represented a majority of the employees in such store, the Company did not violate Section 8 (a) (5) of the Act by not treating such store as an accretion to the existing San Francisco multi-store unit. See *Melbet Jewelry Co.*, 180 NLRB 107 and compare *Houston Division of the Kroger Co.*, 219 NLRB 388, wherein the Union did in fact have a majority of the additional unit."

The Union subsequently acceded to an NLRB election, and won. It did not file a contract grievance. Correspondence between the Union and its attorneys reflect advice by the latter that an election would be the more expeditious procedure. The Union sent the Employer a letter stating that by agreeing to the election it did not waive "any of the rights it has under the National Labor Relations Act, Section 8 (a) (5) and Section 301."

### C. The Employer's Gucci Operations

Gucci manufactures leather and other articles in Italy and distributes them throughout the world, including the United States. It does not itself maintain sales operations in the United States. Rather, it distributes its goods through what can best be described as franchise arrangements.

The Employer entered into such an arrangement with Gucci in 1971, calling for the operation by the Employer of "Gucci Boutiques," under the name "Gucci," at the Employer's stores in San Francisco and Las Vegas. The "Gucci Boutique" in San Francisco was located in the O'Farrell Street store. The agreement provided, among other things, that the Employer was to have the exclusive right to sell Gucci articles and to use the name "Gucci" in San Francisco and Las Vegas; that only Gucci articles would be sold in Gucci Boutiques; and that merchandise would be sold to the Employer at a F.O.B. Florence price plus a percentage "franchise fee." Dr. Aldo Gucci, President of "Gucci Shops, Inc.," reserved the right to approve location, decoration, and design, and to have its architect work as a consultant in planning the boutiques. The Employer was to bear all costs of advertising.

The original franchise agreement was for a period of three years. It was renewed in 1974 for an additional period of three years. Upon its expiration on March 30, 1977, it was not renewed, and is being maintained on a month-to-month basis. No one representing the Employer at the hearing was in a position to state why this month-to-month arrangement exists.

Arguably relevant to the events which transpired are certain communications internal to the Employer. The first of these is an internal memo from A. W. Messer, Vice President of Stores, to Lloyd R. Manning, suggesting "With the Gucci business

expanding like it is, I think it becomes necessary to reevaluate the commissions that we are paying in this department," and proposing that the commission rate be reduced from 6% to 4%. Attached to the memorandum was a list of Gucci salespeople by store, with total salaries and commissions for 1976, and for 1977 through August. Mr. Manning referred the memo to Ray B. Ralph for his recommendations and/or evaluation at the next Executive Committee meeting on November 1. An October 31, 1977 memo from Mr. Ralph to the Executive Committee acknowledges that reducing commissions " does have merit as in most instances commissions exceed the hourly wages for these employees," but noting that any change could not be applicable to the San Francisco store "as the commission structure there is the product of negotiations."

On March 15, 1978, Maria Manetti, Director of Gucci Operations for the Employer, directed a memo to Mr. Gorman, Chief Executive Officer of the Employer, listing answers to "some of your questions regarding the set up of Gucci shops outside of Joseph Magnin." The memo notes that there are several Gucci shops not owned by the Gucci family while bearing only the Gucci name, and that there are "many quality specialty shops in San Francisco that are not unionized." The memo states, "I have calculated the savings to Joseph Magnin in salaries if we will not be subject to union laws." The calculation included salespeople in the existing San Francisco, Las Vegas and Kahala, Hawaii boutiques, and determined the difference to be $172,095 based on 1977 transactions. The memo concludes:

> "The conclusion of the above analysis is that everything should be done to avoid the involvement of the Union because it restricts the freedom of management policies."

On April 15, 1978, the Employer and Gucci entered into a new franchise agreement for a period of ten years commencing January 20, 1978. The agreement makes reference to the continuance of "existing locations" in Carmel, Las Vegas, Hawaii, and Colorado. From the context and other evidence it appears that these "existing locations," like the boutique in the O'Farrell Street store, are maintained within Magnin stores in these areas. In addition, however, the agreement called for the

opening and operation of three "free standing" Gucci shops: one at Ceasars Palace in Las Vegas, one at the Hyatt Regency Hotel in Hawaii, and one at 253 Post Street, San Francisco. The terms of the agreement are similar to those contained in the original franchise agreement pertaining to the San Francisco and Las Vegas boutiques.

Union representatives learned of the proposed Post Street operation some time during the spring of 1978. On June 13, 1978, Elsa Lane, Labor Relations Manager for the Employer, wrote to Sue Monaghan and Richard Williams, Union representataives, as follows:

> "You requested a letter regarding Gucci. My understanding at this time is that a division has been created which will probably be operating a Gucci store on Post Street in San Francisco, as well as stores in other areas. I also understand that the Gucci department in our Downtown San Francisco Store (#1) will remain open. That, as well as any operation, is subject to review."

On September 12, 1978, Walter L. Johnson, President of the Union, wrote Ms. Lane a letter requesting that the Employer "fulfill all requirements of the contract" with respect to the Post Street operations, based on Sections 1 and 27 of the agreement, and protesting that a Ms. McCoy had been informed that in order to be transferred to the new location she would be required to resign and then be rehired with a new employment date.

Ms. Lane responded by letter of September 19, 1978, stating that the Employer's attorney would be sending a written response. The record contains no such written response, however. Instead, there was a Board of Adjustment meeting on or about October 11, 1978, to discuss the matter. Attending that meeting, among others, were Mr. Johnson and Ms. Monaghan for the Union, and Mr. Waud and Ms. Lane for the Employer. Mr. Waud and Ms. Lane informed the Union that the Post Street store would be operated "as a separate entity under the New Magnin umbrella," rather than as part of the Employer's operations, and Mr. Waud made the observation that asking for the contract to apply to the Post Street store was

"tantamount to the Union's claiming jurisdiction over the Emporium through our JM contract." Ms. Lane testified, and Mr. Waud confirmed, that at the time of the Board of Adjustment hearing this was their information, and that plans subsequently changed. During the course of the discussion Ms. Lane made the statement that there were no transfers between stores, and Mr. Waud interrupted her and said, "It doesn't have anything to do with transfers. They are two separate companies and, therefore, the transfers aren't even a subject of this." The Board of Adjustment meeting ended inconclusively. The following day Christine Azzopardi, who was employed in the Gucci boutique of Store 1, and who had attended the Board of Adjustment meeting, came to COB to fill out an employment application for work at the Post Street store, and was informed that it was Company policy not to permit transfers between stores, though she could make out an application for employment if she first resigned her job.

Employees for the Post Street store were recruited through an advertisement in the newspaper. There was an "incredible response" of some 200 applicants. Employees were given a two-week training program, part of it at COB. It does not appear that any persons previously employed by the Employer were hired. The new shop officially opened November 16, 1978. As of December, 1978 it employed approximately 25 sales personnel.

## D. Relationship of Gucci Operations to Other Magnin Operations

The Gucci shop within the O'Farrell Street store is described by the Employer's Controller as a "department" within that store. It is considered part of Store #1 for fiscal purposes, and its financial operations are accounted for on a combined basis with the other departments within that store.

The Gucci store on Post Street is described by the Controller as a "wholly owned division of Joseph Magnin Company, Inc." The Employer owns the lease, the merchandise, the furniture and fixtures, and leasehold improvements. The business tax registration for the store is in the name of the Employer, as is the building and sales permits.

The Gucci store on Post Street generates a separate Profit and Loss Statement, balance sheet, and miscellaneous financial data, and maintains a separate budget, including its own advertising budget. The store is charged for certain direct expenses, and is in addition allocated an overhead charge for Joseph Magnin management. Its financial affairs are accounted for through the Employer's computer, but manually separated for statement purposes. It differs from other stores of the Employer to the extent that the Employer has undertaken certain commitments in its franchise agreement with Gucci, previously described: It sells only one line of merchandise; Gucci retains certain controls over design architecture and advertising; sales personnel wear Gucci uniforms; and the Employer undertakes to allocate a specific percentage of gross purchases to advertising.

The Post Street store's manager, Colin Lewis, was previously employed as the manager of the Employer's Sherman Oaks store. He spent some time in the Gucci boutique at O'Farrell Street before assuming his responsibilities at the new location. He has a double reporting responsibility: to Maria Manetti, as Director of Gucci Operations, and to the Regional Manager for the Employer.

Initially, recruitment and screening of applicants for hire at the Post Street store was conducted by the Employer's Personnel Department. That department still performs the recruitment function, and consultation and advice on personnel matters but hiring and firing and other day-to-day personnel matters are under the direction of the store manager, as in other stores of the Employer. Terms and conditions of employment for employees at the Post Street store are established centrally by the Employer. They receive the same health and welfare plan as all Magnin employees. They also receive the same 20% discount as all other Magnin employees. Their hours differ from those of other Magnin employees in that the Post Street store is closed during the noon hour. They operate on a commission basis established by the Employer. They are paid by the Employer's payroll department, on Magnin checks.

There is no evidence of interchange or transfer of employees to date between the Post Street store and other stores of the Employer. There is, however, a significant degree of functional

integration. Gucci merchandise, whether for the Store No. 1 Gucci shop or for the Post Street store, is purchased by separate buyers, located at Post Street. It is received, marked, and sent to the appropriate sales location by bargaining unit personnel at COB. On occasion, stock clerks and sales associates from the O'Farrell store will go to the Post Street store to pick up merchandise at customer request; similarly Post Street sales associates may go to the O'Farrell store for that purpose. Magnin credit cards may be used at the Post Street store; Gucci merchandise purchased at Post Street may be returned to the Gucci shop at O'Farrell Street for credit; merchandise may be transferred between the two stores upon customer request; and phone calls to the Post Street store go through the Magnin switchboard. On occasion also customers are referred from Store No. 1 to the Post Street store or *vice versa* for Gucci merchandise available at one but not the other. The Director of Gucci operations is located in the O'Farrell Street store.

## E. Impact of the New Operations upon Store No. 1

When the Post Street store opened in November, 1978, certain merchandise was transferred to it from the Gucci boutique at O'Farrell Street. All ready-to-wear items were transferred, and the Gucci boutique no longer sells such items. These items were relatively high priced, enabling sales associates to make good commissions on them. They represented from 15% to 20% of the dollar volume of sales at the Gucci boutique. In addition, substantial quantities of other merchandise—shoes, scarves, handbags, and jewelry—were transferred from the Gucci boutique, either from the stockroom or directly off the floor, to the Post Street store. According to sales personnel at the Gucci boutique, the stock of merchandise at the boutique has never been completely replenished. In general, the Post Street store stocks a larger variety of styles and colors of all types of Gucci merchandise.

Sales personnel at the Gucci boutique testified that they have on occasion lost sales because of merchandise transferred to the Post Street store and no longer in stock at O'Farrell Street. In addition, prior to the opening of the Post Street store, sales personnel at the Gucci boutique could arrange for transfer of merchandise from another Magnin-Gucci location, obtaining a

commission on the sale, but when customers learn that they can obtain the merchandise two blocks away they are more likely to walk out and go there. Consequently, O'Farrell Street Gucci personnel may lose commissions in such cases. One employee testified she has had difficulty in making her quota since the Post Street opening, though she did not have difficulty before.

The Union has attempted to demonstrate an adverse impact upon the ability of Gucci personnel at O'Farrell Street to earn commissions by data showing a substantial reduction in sales between November, 1977 and November, 1978 (from $183,791 to $129,433), and between December, 1977 and December, 1978 ($345,490 to $220,086) and by data showing a decline in commissions earned by some of the O'Farrell Street employees during those months. In both cases, however, the data are subject to variables which make accurate comparison difficult. There was a two-week strike during November, 1978, for example, which obviously affected gross sales. Partly for that reason and partly for other reasons which are not explained in the record, the employees at the O'Farrell Street worked fewer hours during the months of November and December, 1978 than they did during those months of the preceding year. When commissions earned are divided by hours worked for each month, the data reveal that all but one of seven employees for whom comparative information is available actually earned a greater amount of commissions per hour in November, 1978 than in November, 1977; and that four of the seven earned a greater amount of commissions per hour in December, 1978 than in December, 1977. Viewing the seven employees collectively, they earned approximately $8,913 in commissions for the months of December, 1977 by working 1,120 hours for a rate of approximately $8.04 per hour, and $6,772 in commissions for the month of December, 1978 working 779 hours, for a rate of approximately $8.68 per hour. On the other hand, there was testimony that the price of Gucci articles increased from between 25% and 100% during the year, and on that basis it might be expected that the earnings per hour would have increased by an even greater amount had it not been for the competition of the Gucci shop on Post Street.

While the data are inconclusive, it may be inferred from the totality of evidence that Gucci personnel at O'Farrell Street

have been adversely affected in their ability to earn commissions by the proximity of the Post Street shop, by the generally greater variety of merchandise available at that shop, and by the transfer of Gucci merchandise from O'Farrell Street to that shop.

## F. Policies and Practices Regarding Transfers

A considerable portion of the hearings in this matter was devoted to testimony and to other evidence of past practices regarding transfer of employees. The record on this score is complex and in many respects ambiguous. It can best be divided into five parts: early practice, the company's written policies, the Emporium situation, the Magnarama situation, and other evidence.

1. **Early Practice.** Ms. Monaghan, who has been a Business Representative for about five years, with the Employer as one of her assignments, testified that the practice of transferring between stores has been "customary" during that period, and that the custom was that the most senior person who makes a request to transfer would be permitted to transfer. She testified that prior to late 1976 or early 1977 job openings in various stores would be posted, and employees were permitted automatically to transfer on the basis of seniority, within the bargaining unit. This testimony went unrebutted except for the hearsay testimony of Ms. Lane, who says she questioned several unidentified people "who told me that they have never posted jobs across the Company."

2. **The Company's Written Policies.** Introduced in evidence was a document entitled "Joseph Magnin Personnel Policies, Transfer of Hourly Employees between JM Locations," dated September 26, 1977. The policy states:

> "Hourly employees will not normally be transferred from one Joseph Magnin location to another.
>
> "If an hourly employee relocates to another area for personal reasons, such employee may be considered for any available opening for which they are qualified in a store located in the area to which they are relocating.

> "Permission to interview for a position in the new location must be requested in writing and be approved by the Director, Personnel Administration. Relocation must take place within 30 days to avoid a break in service."

Ms. Lane, who has been Director of Personnel Administration and Labor Relations for only a little over a year, was unable to say how long that policy had been in effect. No evidence of any prior written policy was introduced.

Ms. Lane testified to the reasons she believed to underlie that policy:

> "The reasons for the generally no-transfer policy are really three-fold. First of all, we are concerned in areas where we have stores in close proximity that managers have a tendency to steal good employees from each other, and that can create a problem. They pick up a high seller and move them, steal them away, and pretty soon you have them all grouped in one store. That doesn't make for a balanced staff. On the other hand, a no-transfer policy allows you to prevent the pawning of problem employees off on less suspecting managers. From a logistics point of view, to allow transfers at the employee's request or anytime someone decided thay wanted to move from one place to another would create problems in terms of staffing, a problem of keeping track who people are. And in a Union situation, the whole seniority issue would be a problem. So, logistically, it would be very difficult."

3. **The Emporium Situation.** The Employer, as already noted, declined to permit employees within the Union's bargaining unit to transfer to the Emporium location. There is evidence, however, that it permitted employees from Magnin stores outside the bargaining unit to do so. Ronna Schulkin testified she applied for such a transfer from the Oakland store in 1977, and was told that her name would be added to the list of those desiring employment at the new location if her store manager approved. She was hired for the Embarcadero store, and went to work there. She was not required to resign her

Oakland job. She retained her seniority for purposes of vacation and pay. Her employment record reflects that she was "transferred." There is evidence that at least two other employees, Vicki Reyes and Nancy Nunes, transferred from Oakland to the Embarcadero store in the same manner. In addition, Pauline Nunes was transferred from the Hayward store to Embarcadero.

4. **The Magnarama Situation.** The Union attempted to show that despite this stated policy on the part of the Employer, employees have frequently transferred from one location to another, and often at the employee's request. One area of evidence in that connection pertains to events surrounding the closing of the Magnarama operation in 1978. When the Employer decided to close that operation, which was then housed in the City of Paris building, it announced that all employees would be terminated. The Union filed a grievance asserting that "in accordance with the collective bargaining agreement, the affected individuals are entitled to placement in jobs where less senior employees are working." The Employer responded by letter dated February 6, 1978, stating:

> "Due to the unique operational affiliation of the Magnarama department and the O'Farrell Street store, every attempt has been made to place the employees in other areas within the store. Due to unusual circumstances surrounding this closing we are making these placements on a non-precedential basis."

The Union responded by letter dated February 9, 1978, stating in part:

> "The placement of our members was done on the basis of seniority in accordance with Section 19 of the collective bargaining agreement. Thus, we do not agree with your statement that 'These placements (are) on a non-precedential basis.' The rights of our members have been enforced over the years, and there is a long history of precedent to establish the fact that our members have bumping rights when their jobs are eliminated."

Despite the conflicting characterizations of the Employer's actions, Magnarama employees were in fact permitted to transfer into other jobs, principally back into Store #1 from which most of them had come.

5. **Other Evidence.** The Union introduced in evidence a list of approximately 50 employees who, it asserts, were permitted to transfer, many at their own request, from one location to another within the Magnin operation over a period of years. The list was supplemented by the Employer's personnel records, responses to a Union questionnaire, and by personal recollections of Ms. Lane and Ms. Monaghan. In some cases the Employer's personnel records proved to be inaccurate, and in the case of five employees no records could be located. Some of the 50 were employees whose transfers occurred in connection with the Magnarama and Embarcadero operations, as previously described and some transferred pursuant to relocaton of residence. On the basis of the best available evidence, the record of the remaining transfers can be summarized as follows:

1. Vernadine Perry was transferred in 1965 from the Oakland store to COB, at her request.
2. Alice Verkett transferred from Store #1 to Fox Plaza in 1970.
3. Howard Ferrier transferred from Berkeley to Oakland in 1975, and to COB in the same year, as a receiving clerk.
4. Chris Holt transferred from Stonestown to Montgomery Street in 1971.
5. Elaine Crowley, laid off at the Stonestown store in early 1975, was transferred to COB later that year in settlement of a grievance.
6. Henry Banquerigo was transferred in 1974 from Store #1 to COB, when the shoe department at Store #1 was closed.
7. Laura Strahan was transferred from Fox Plaza to Store #1 in 1974. Her record indicates the transfer was at her request.

8. Mary Ko transferred from O'Farrell Street to Montgomery Street in 1960.

9. Anna Toscano was transferred from Store #1 to COB in 1965, to Store #138 in 1966, and to the Mail Order Department in the same year.

10. Gena O'Keefe was transferred in 1962 from Montgomery Street to Stonestown, and in 1973 from Stonestown to Store #1.

11. Stella Wong was transferred from Stonestown to Fox Plaza in 1970.

12. Lupe Hutchings was transferred in 1976 from Oakland to Fox Plaza.

13. Marcella Soo Hoo (MacCaug) was transferred in 1971 from COB to Fox Plaza.

14. Willa Lessig was transferred in 1960 from Store #1 to Montgomery Street.

15. Winifred Wong was transferred in 1978 from Store #1 to COB. This involved a promotion to the position of Jr. Assistant Buyer, a salaried position.

16. Margaret Cassart was transferred in 1974 from O'Farrell Street to Montgomery Street.

17. Cala Sequerira (Mitchell) was transferred in 1974 from Stonestown to Fox Plaza as a replacement for Laura Strahan.

18. Josephine Smith was transferred from Stonestown to Montgomery Street in 1972. Her record reflects this was a demotion. She then transferred to O'Farrell.

19. Betty Hamilton was transferred from Mountain View to Store #1 in 1973 at her request.

20. Sylvia Moffett was transferred from Stonestown to Walnut Creek in 1977 because of difficulty in commuting.

21. Cala Mitchell transferred from Stonestown to Fox Plaza.

22. Pat Alex transferred several times between 1963 and 1968 back and forth between O'Farrell and Fox Plaza.

23. Grace Hinz transferred from O'Farrell to COB at some undetermined date.

24. Leo Panavo transferred from O'Farrell to COB in 1974.

In addition to the foregoing, the Union submitted other evidence designed to show that the company's announced policy of not permitting transfers was either discriminatorily implemented or otherwise not *bona fide*. It introduced, in that connection, an intracompany memorandum from Mr. Gorman dated January 9, 1978, citing "personnel transfer among stores" as one of the advantages of a regional chain. Ms. Monaghan testified to a conversation with Arman Tobler, Vice President of Personnel and Ms. Lane's superior, which occurred in January, 1979, in which Ms. Monaghan expressed the view that the Company's position in not allowing transfers was unfair and Mr. Tobler assertedly said, "You know, the only reason for taking that position is because of the Gucci situation." He informed Ms. Monaghan that in his view "Joseph Magnin transfers were very important." Mr. Tobler did not appear at the hearings. Finally, the Union submitted an affidavit from Frank Arrellano, an employee at Roos Atkins, to the effect that he applied for a job at the Post Street store on or about November 9, 1978 and was informed by the Store Manager that the store "wasn't going to be Union," that it "would be patterned after 'our' shops in other cities, like Beverly Hills, are non-union," and that he didn't think he wanted to hire anyone that's in a union because he said he "doesn't like unions and he doesn't like Walter Johnson." Mr. Arellano was present for cross examination. There was no rebuttal.

## V. ANALYSIS

### A. General Applicability of the Contract to the Post Street Shop

For purposes of analysis it will be helpful to distinguish between the question whether the agreement between the parties applies generally to the Gucci Shop on Post Street, and the more limited question whether the agreement in any event imposes relevant obligations with respect to the transfer of

employees from Store #1 to the Gucci Shop. The two questions are related, as will be discussed; they are also to some extent distinct. Only the first question will be considered in this section.

Whether the agreement between the parties applies generally to the Gucci Shop on Post Street is a question, in the first instance, of contract interpretation. The Employer in its brief suggests, quite correctly, that an issue of national labor policy is also ultimately entailed: the National Labor Relations Board and the Courts have established limitations upon the extension of agreements to new facilities, in order to protect the basic right of employees under the National Labor Relations Act to participate in the selection of their bargaining representative. Thus, question arises as to the role in this arbitration of legal issues arising under the Act.

The United States Supreme Court has spoken generally to this issue in *Alexander v. Gardner-Denver Co.*, 415 U.S. 36 (1974). There, in the context of a dispute involving the relationship between arbitration and proceedings under Title VII of the Civil Rights Act of 1964, the Court declared:

> "As the proctor of the bargain, the arbitrator's task is to effectuate the intent of the parties. His source of authority is the collective bargaining agreement, and he must interpret and apply that agreement, and he must interpret and apply that agreement in accordance with the 'industrial common law of the shop' and the various needs and desires of the parties. The arbitrator, however, has no general authority to invoke public laws that conflict with the bargain between the parties."

This does not mean that public laws are irrelevant to an arbitration proceeding. They may be relevant in casting light upon what the parties meant by their agreement. And presumably an arbitrator ought not to order a result which clearly conflicts with applicable law. Subject to those qualifications, however, it is the contract and its meaning which is the focus of the arbitrator's function.

The Union relies upon the language of Section 1 of the agreement for the proposition that the contract applies: that

section provides for recognition of the Union as bargaining agent for "all employees employed at the San Francisco stores of Joseph Magnin" (with exceptions not relevant here); the Gucci Shop is a "San Francisco store of Joseph Magnin"; *ergo*, the contract applies to the Gucci Shop.

The Employer disputes this simple syllogism by pointing out that Section 1 does not mention "accretion," or "after-acquired stores," and draws from this absence of express language pointing to the future the implication that Section 1 is simply a declarative statement of the *status quo*—that the Union is "recognized" at certain unspecified Magnin stores in San Francisco.

On its face, however, the language of Section 1 supports the Union's view. Similar language has been regarded by the NLRB, courts, and arbitrators as constituting the equivalent of an "additional store" clause. See, for example, *Kroger Co.*, 208 NLRB #122, denied enforcement on other grounds in *Retail Clerks Local 455 v. NLRB*, 88 LRRM 2892 (D.C. Cir., 1975), in which both the NLRB and the Court of Appeal characterized in that fashion a clause which provided that the Union "shall be the sole and exclusive bargaining agent for all employees employed by the Houston Division of Kroger Food Stores operating in the State of Texas." And see *Clark Equipment Co.*, 50 LA 39 (1967), in which Arbitrator Burton Turkus found a clause describing the employer as "Clark Equipment Company, New York Sales and Service Branch, operating in the New York Metropolitan Area" to imply inclusion of a new plant within that geographical area.

Here, in addition, there is past practice supporting the Union's interpretation of the clause. It is undisputed that during the period of multiemployer agreements containing language identical to Section 1 new stores within the San Francisco area were considered to be covered automatically by the agreement. When the Employer began to bargain separately with the Union after the 1970 agreement, it was not writing on a clean slate. Language from the old agreements came to the new with the gloss of past practice. Nor, in accordance with substantial arbitral precedent, is past practice erased simply by change in ownership, under circumstances in which the new owner knew or (as in this case, at least) should have known of such practice.

Thus, the fact that the new ownership of Joseph Magnin "reassessed its position," to use the language in the Employer's brief, does not mean that its new position was contractually permissible. The Magnarama situation, while perhaps distinguishable factually, certainly does not detract from that past practice and to some extent supports it. The only contrary practice occurred in connection with the Embarcadero store, and the circumstances were not such as to warrant the conclusion that the Union was acceding to a change in the interpretation of Section 1.

The Union has more than an institutional interest in this case in protecting its jurisdictional rights under Section 1, since the interests of unit employees are clearly and directly affected by the potential for dimunitions in their commissions if not their prospective employment. For all of the above reasons, it is concluded that the agreement does apply generally to the Post Street store, unless applicable statutory principles clearly require a different result.

The NLRB's position appears to be that extension of an existing contract to a new facility is not permissible unless (a) there is evidence that the Union represents a majority of employees at the new location, or (b) the new facility may be considered an "accretion" to the existing unit. *Melbet Jewelry Co.*, 180 NLRB 107; *Houston Division of the Kroger Co.*, 219 NLRB [illegible] The Union does not claim in this case to have any evidence of majority representation at the Post Street store. It does claim, however, that the Employer's acts in denying Magnin employees the opportunity to transfer to the new location is contrary to the agreement; and to the extent that claim is determined to be well-founded, it may well have some bearing upon the representation question.

Whether or not the new facility may be said to constitute an "accretion" to the existing unit similarly turns, in part, upon the transfer issue. In *Pix Manufacturing Co.*, 181 NLRB 88 (1970), the Board stated:

> "In determining whether a particular operation constitutes an accretion or a separate unit, the Board gives weight to a variety of factors, such as integration of operations, centralization of managerial and

> administrative control, geographic proximity, similarity of working conditions, skills, and functions, control over labor relations, collective bargaining history, and interchangeability of employees."

See also *Bryan Infants Wear Co.*, 235 NLRB No. 180 (1978). As previously stated, there is a significant degree of integration of operations between the Post Street store and other Magnin operations, and particularly between the Post Street store and the Gucci operations in Store #1. The new facility is located only two blocks away from Store #1. Working conditions are similar except for the lunch hour closing at the Post Street shop. Skills and functions, at least for employees in the Gucci operations at the two stores, are identical. Personnel policies are formulated and implemented centrally, though day-to-day personnel supervision is furnished by the store manager. There is no collective bargaining history pertaining to the Post Street shop, since that is the issue to be determined. That leaves the factor of "interchangeability of employees"—or more broadly, as the Board stated it in *Bryan Infants Wear Co., supra*, "the extent of interchange and contact between the groups of employees."

There is, as previously indicated, significant contact between Gucci operation employees at the Post Street and O'Farrell Street stores, through communication over location of particular merchandise and exchange of merchandise, but there has been, of course, no interchange or transfer, due to the Employer's policies at issue here. In this respect, the situation is similar to that which confronted Arbitrator Porter in *Washington Metropolitan Area Transit Authority*, 61 LA 1259 (1974), where the question was whether employees of a bus company represented by one division of the union constituted an accretion to a larger unit of employees of another bus company where both companies were acquired by an area transit authority. The arbitrator took note of the fact that the NLRB regards as particularly significant the factors of "integration of operations" and "interchangeability of employees," and of the fact that "relatively little has been done to date" in either regard, but reasoned that action in both these areas necessarily awaited outcome of the arbitrator's determination. Based in part upon that reasoning, he concluded that an accretion did occur.

There is a sense based on this record, in which the Post Street store may be said to constitute an extension of the Gucci operations at O'Farrell Street. See *Goodyear Tire & Rubber Co.*, 195 NLRB No. 141 (1972); *Burroughs Corp.*, 214 NLRB No. 88, in both of which the Board found accretions on the basis of some of the factors present here. Whether the Board would find an accretion in this case in light of all the findings and conclusions reflected in this opinion or determined independently by the Board is not a question which the Arbitrator is called upon to resolve. Indeed, it is quite clear that the Board will not defer to the Arbitrator's judgment insofar as the issue is one of law and national labor policy. The only additional question that need be decided here is whether, on the basis of applicable precedent, it is so clear that the parties could not lawfully apply their agreement to the Post Street store that the Arbitrator should refrain from deciding that the agreement applies. Based in part upon the analysis above, and in part on the analysis which follows, I conclude that the answer to this question is negative.

**B. The Transfer Issue**

Here, again, it will be helpful to distinguish between two related but analytically distinct questions. One is whether employees generally have the contract right, as the Union claims, to transfer at their option from one store to another within the bargaining unit on the basis of seniority subject to qualifications. The other, narrower, question is whether the Employer violated the agreement by refusing to allow employees from the Gucci boutique at O'Farrell Street to transfer to the Post Street store under the circumstances present here. The first question, insofar as it is relevant to this case, involves the assumption that the contract applies to the Post Street store as part of the bargaining unit. The second question, as will be discussed, does not necessarily entail that assumption.

The Union asserts that an affirmative answer to the first question is dictated by the language of contract section 19B, interpreted in the light of past practice. But, as the Employer points out, Section 19B does not on its face speak in terms of seniority. Moreover, that section speaks in terms of transfers between "departments," rather than between stores. Nothing elsewhere in the contract, including the sections on seniority,

provides explicitly for transfer at the employee's request. The Union's case on this point turns, then, upon evidence of past practice unaided by express contract language.

Clearly transfer of employees from Oakland to the Embardacero store does not support the Union's position with respect to the first question, since those employees were not covered by union agreement at the time they transferred. The Magnarama situation is more in point, but the Employer's characterization of that situation and its resolution has merit. The Employer in its brief makes two points. One is that both the Union and the Employer regarded the Magnarama operation as a "department" of Store #1. The other, more significant, is that the Union in its correspondence and other communications regarding the Magnarama situation regarded the dispute as involving the right of employees with seniority to bump employees with lesser seniority in the face of impending layoff, rather than as involving the right of employees generally to transfer at will. As the Employer states in its brief:

> "The Union itself from the beginning of the Magnarama dispute with the Company did not look on the matter as one involving 'transfer rights' as it is now attempting to define that term. Instead, the Union felt the situation was one involving the seniority rights of employees who were faced with losing their jobs when the Magnarama department closed. . . . it did *not* argue that the employees working in Magnarama had a right to transfer anywhere they desired, only that their seniority allowed them 'bumping rights when their jobs were eliminated. . . .' The Magnarama situation was considered by all parties to be a seniority dispute, and nothing more."

In other words, the Employer is arguing that the Magnarama resolution may stand for the proposition that employees faced with impending layoff may exercise their seniority to bump employees in other locations, but does not constitute precedent supportive of the generalized right to transfer for which the Union contends. I find that argument persuasive.

The other evidence pertaining to past practice consists of Ms. Monaghan's general testimony that in years gone by jobs were posted and employees were permitted to bid on jobs in other stores on the basis of seniority, together with the evidence pertaining to individual transfers. That general testimony would be more persuasive if it were supported by evidence that any of the individuals who in fact transferred did so on the basis of bid, but that evidence is lacking. Nothing in the Employer's records, in the responses to the Union Questionnaire, or in Ms. Monaghan's testimony indicates that job bidding was involved in any of the individual cases in evidence. Moreover, in only a couple of the cases is there evidence that the transfer was at the employee's request. In the other cases, the evidence simply shows that the employee was transferred. And even in the cases where the transfer was at the employee's request, nothing in the context evidences that the request was considered a matter of contractual right. There is no evidence of any prior grievance over transfer rights, even after the Employer's new policy of not allowing transfer. I conclude that the Union has failed in this case to show a past practice of sufficient magnitude and regularity as to establish a contractual obligation in the absence of express contract language.

We now turn to the narrower question: whether the Employer violated the agreement by refusing to allow employees from the Gucci boutique at O'Farrell Street to transfer to the Post Street store under the circumstances present here. Particularly relevant to this question are Sections 1, 3A, and 5 of the agreement. Section 1, as previously discussed, obligates the Employer to recognize the Union at and extend the agreement to all stores of the Employer in San Francisco. This obligation is necessarily qualified, of course, by the restrictions of applicable law. Whether applicable law permits implementation of this obligation, however, is to some extent subject to factors within the Employer's own control. Specifically, the Union's ability to demonstrate majority support at the new location, or in the alternative its ability to establish the new location as an accretion to the existing unit to the satisfaction of NLRB requirements, may depend upon whether the Employer permits Magnin employees to transfer into the new location. Viewed in this light, the question is whether the Employer is

free to impose a limitation upon transfers under circumstances in which that limitation may well frustrate the intent and purpose of its obligations under Section 1.

The Union suggests that the opening of the Post Street shop represents part of a plan to insulate Gucci operations from the Union contract entirely, and that the next step is likely to be the phasing out of the Gucci boutique at Store #1. Whether or not the Union is correct in that apprehension, it is a fair inference from the record that top management of the company considered avoidance of Union presence at Post Street to be an important aspect of that enterprise, contributing to its financial success. That underlying motivation raises some suspicion as to the Employer's motives in adopting and applying its no-transfer policy, and that suspicion is compounded by other evidence: the fact that employees were permitted to transfer from nonunion stores in Oakland to Embarcadero Center store at a time when employees from union stores in San Francisco were not permitted to transfer; the fact that the no-transfer policy has been applied unevenly in other respects; the fact that Mr. Gorman, the top administrative official of the company in San Francisco, stated that opportunity for interstore transfers was an important asset of a regional chain; and the fact that Ms. Lane's superior, stated to Ms. Monaghan that he considered transfers to be important, and the the Gucci situation was responsible for the current no-transfer rule. Considered together, this evidence is sufficient to establish a *prima facie* case of improper motivation, shifting to the Employer the burden of explanation and rebuttal.

On this record there are significant gaps in the Employer's case. The Employer offered no explanation for the transfers which were permitted between Oakland and Embarcadero. It offered incomplete explanation for the other transfers which have occurred. It offered no explanation for the apparent incompatibility of the no-transfer rule and Mr. Gorman's statement that the opportunity for transfers between stores was an important asset of a regional chain. Ms. Lane's superior did not appear to rebut or explain the remarks attributed to him. And while Ms. Lane testified as to her understanding of the reasons underlying the Employer's no-transfer policy, it is quite clear that the policy was adopted before she arrived on the

scene, and no one responsible for its adoption was called upon to explain when, why, or under what circumstances that policy was born. We are left, therefore, with the strong inference that a significant factor underlying the adoption of the Employer's no-transfer rule was a desire to "contain" the Union and restrict its influence in new stores opened by the Employer.

On this premise, the Employer's no-transfer rule operated to preclude union employees from transferring from Store #1 to Post Street in part precisely because they *are* union employees and, therefore, to discriminate against them "on account of membership in . . . the Union" in violation of Section 3A of the agreement.

Section 5B provides an additional perspective from which to view the Employer's actions. Nothing in the record casts direct light upon the intent of that language. It seems appropriate to say, however, that at a minimum it means the parties are to deal with one another fairly and in good faith and refrain from actions which, without substantial justification, frustrate the purposes of the agreement or interfere with the harmonious relationship of the parties. Obviously the no-transfer rule has the effect of "interfering with the faithful performance of [the] Agreement," by the Employer, insofar as that rule operates to preclude or restrict lawful extension of the agreement to new locations, and of interfering with the harmonious relationship of the parties as well. If we assume improper motivation for the rule, as discussed above, then adoption and implementation of the rule would quite clearly constitute a violation of Section 5B as so interpreted. But even apart from independent evidence as to motivation, the effect of the rule upon rights protected by the agreement is such that, in light of the language of Section 5B read in conjunction with Section 3A, the rule cannot be applied to this situation without proof of substantial justification in terms of the Employer's business needs. Precedent under Title VII of the Civil Rights Act of 1964, to the effect that rules neutral on their face may nevertheless be unlawful if they have adverse impact upon protected classes and cannot be justified in terms of business necessity, provides a useful analogy as does precedent under the NLRA to the effect that in certain cases of discrimination involving adverse effects the employer is required to come forward with evidence of "legitimate and substantial

business justifications for the conduct." *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971); *NLRB v. Great Dane Trailers*, 388 U.S. 26 (1967).

The reasons advanced by Ms. Lane for the existence of the no-transfer rule may well be relevant to the general right-to-transfer principle advocated by the Union, but they scarcely provide adequate justification for the position which the Employer has taken in this situation. One of the reasons, precluding store managers from foisting off less productive employees on other stores, would seem to have no application at all to voluntary transfers. Another, that of precluding store managers from stealing more productive employees, would seem to have no application to this situation, and in any event the purpose served by the rule in that regard could be met in other, less intrussive, ways. The fact that a number of transfers have in fact occurred undercuts the significance of the rule, and the Employer produced no evidence beyond Ms. Lane's bare assertions in support of it.

It is concluded, therefore, that the Employer violated the agreement by refusing to allow employees from the Gucci boutique at O'Farrell Street to transfer to the Post Street store. This conclusion is premised on Sections 1, 3A, and 5 of the agreement, rather than upon Section 19B and is independent, therefore, of any assumption as to whether the Post Street store is or is not part of the bargaining unit.

## VI. REMEDY

The Employer's brief does not address the question of remedy. The Union in its brief proposes that the Arbitrator order the Employer to allow the seven Gucci salespeople currently employed at O'Farrell Street to transfer to Post Street if they still desire to do so, that any other Joseph Magnin salesperson with requisite ability and seniority be allowed to transfer as well, and that Gucci salespeople be made whole for lost commissions.

The first of the Union's proposals is appropriate and will be made part of the award. The second goes beyond the issue stipulated both by the court order and by the stipulation of the parties in this matter, and is therefore inappropriate.

The third proposal, that provision be made for commissions lost, assumes facts not clearly in evidence. It is not the commissions which O'Farrell-Gucci employees may have lost at Store #1 by the operations of the Post Street store that is at issue on this point, but rather the commissions they would have earned at Post Street if they had been permitted to transfer. The Union suggests that they might be made whole by comparing the average commissions of the O'Farrell Gucci salespeople with the Post Street Gucci people, but that comparison fails to support the Union's premise. For example, for the month of March, 1979, 15 employees at the Post Street earned a total of $5,602 in commissions, for an average of $373 per employee while seven employees at the O'Farrell boutique earned $2,687 in commissions for an average of $384 per employee. The Post Street employees worked a total of 2,190 hours during that month, earning commissions at the rate of approximately $2.50 per hour while O'Farrell Street emplyed worked a total of 802 hours, earning commissions at the rate of approximately $3.30 per hour. The Union in its brief suggests that because the Post Street store has been packed with an excessive number of nonunion employees, resulting in low average commissions, the figures should be adjusted. No evidence is provided or suggested, however, that would enable such an adjustment to be made. Accordingly, this requested relief is denied.

## AWARD

1. Employees employed in the Gucci Department of Joseph Magnin's San Francisco Department Sotre may transfer to the Gucci Shop owned and operated by Joseph Magnin at 153 Post Street, San Francisco, pursuant to the collective bargaining agreement between the parties.

2. The Employer is directed to allow such employees to transfer on the basis of their seniority if they so desire.

Dated_____

Joseph R. Grodin, Arbitrator

IN ARBITRATION PROCEEDINGS PURSUANT TO THE COLLECTIVE BARGAINING AGREEMENT BETWEEN THE PARTIES

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|---|---|
| In the Matter of a Controversy between DEPARTMENT STORE EMPLOYEES UNION LOCAL 1100, *Complainant* and JOSEPH MAGNIN, *Respondent* Involving the issue of transfer of Gucci employees. | CORRECTION OF OPINION AND AWARD |

The Opinion and Award in the above matter contains an evident mistake in description at pages 23 and 25, in that the word "Emporium" wherever it appears on those pages should read "Embarcadero." The Opinion and Award is hereby corrected in that respect. Corrected pages are attached for substitution.

Dated _____

Joseph R. Grodin, Arbitrator

approximately $8,913 in commissions for the months of December, 1977 by working 1,120 hours for a rate of approximately $8.68 per hour. On the other hand, there was testimony that the price of Gucci articles increased from between 25% and 100% during the year, and on that basis it might be expected that the earnings per hour would have increased by an even greater amount had it not been for the competition of the Gucci shop on Post Street.

While the data are inconclusive, it may be inferred from the totality of evidence that Gucci personnel at O'Farrell Street have been adversely affected in their ability to earn commissions by the proximity of the Post Street shop, by the generally greater variety of merchandise available at that shop, and by the transfer of Gucci merchandise from O'Farrell Street to that shop.

## F. Policies and Practices Regarding Transfers

A considerable portion of the hearings in this matter was devoted to testimony and other evidence of past practices regarding transfer of employees. The record on this score is complex and in many respects ambiguous. It can best be divided into five parts: early practice, the company's written policies, the Embarcadero situation, the Magnarama situation, and other evidence.

1. **Early Practice.** Ms. Monaghan, who has been a Business Representative for about five years, with the

evidence of any prior written policy was introduced.

Ms. Lane testified to the reasons she believed to underlie that policy:

> "The reasons for the generally no-transfer policy are really three-fold. First of all, we are concerned in areas where we have stores in close proximity that managers have a tendency to steal good emplyees from each other, and that can create a problem. They pick up a high seller and move them, steal them away, and pretty soon you have them all grouped in one store. That doesn't make for a balanced staff. On the other hand, a no-transfer policy allows you to prevent the pawning of problem employees off on less suspecting managers. From a logistics point of view, to allow transfers at the employee's request or anytime someone decided they wanted to move from one place to another would create problems in terms of staffing, a problem of keeping track who people are. And in a Union situation, the whole seniority issue would be a problem. So, logistically, it would be very difficult."

3. **The Embarcadero Situation.** The Employer, as already noted, declined to permit employees within the Union's bargaining unit to transfer to the Embarcadero location. There is evidence, however, that it permitted employees from Magnin stores outside the bargaining unit to do so. Ronna Schulkin testified she applied for such a transfer from the Oakland store in 1977, and was told that her name would be added to the list of those desiring employment at the new location if her store manager approved. She was hired for the Embarcadero store, and went to work there. She was not required to resign her Oakland job. She retained her seniority for purposes of vacation and pay. Her employment record reflects that she was "transferred." There is evidence that at least two other employees, Vicki Reyes and Nancy Nunes, transferred from Oakland to the Embarcadero

# RELEVANT STATUTES

Labor-Management Relations Act

Section 201. That it is the policy of the United States that . . . (b) the settlement of issues between employers and employees through collective bargaining may be advanced by making available full and adequate governmental facilities for conciliation, mediation, and voluntary arbitration to aid and encourage employers and the representatives of their employees to reach and maintain agreements concerning rates of pay, hours, and working conditions, and to make all reasonable efforts to settle their differences by mutual agreement reached through conferences and collective bargaining or by such methods as may be provided for in any applicable agreement for the settlement of disputes; and

Section 203. Functions of the Service

(d) Final adjustment by a method agreed upon by the parties is hereby declared to be the desirable method for settlement of grievance disputes arising over the application or interpretation of an existing collective-bargaining agreement. The Service is directed to make its conciliation and mediation services available in the settlement of such grievance disputes only as a last resort and in exceptional cases.

Section 301. Suits by and against Labor Organizations

(a) Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this Act, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

National Labor Relations Act

Section 10. Prevention of Unfair Labor Practices

(a) The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in seciton 8) affecting commerce. This power shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise:

*Provided*, That the Board is empowered by agreement with any agency of any State or Territory to cede to such agency jurisdiction over any cases in any industry (other than mining, manufacturing, communications, and transportation except where predominantly local in character) even though such cases may involve labor disputes affecting commerce, unless the provision of the State or Territorial statute applicable to the determination of such cases by such agency is inconsistent with the corresponding provision of this Act or has received a construction inconsistent therewith.

## PROOF OF SERVICE

I, Kirk W. Harney, hereby declare that:

I am a citizen of the United States, over eighteen years of age and not a party to the within action. I am employed at 3340 Ocean Park Boulevard, Suite 3005, Santa Monica, California 90405.

On October 24, 1983, I served the *Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit* by placing three true copies thereof enclosed in a sealed envelope with postage thereon fully prepaid in the United States mail at Santa Monica, California, as follows:

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Department of Justice
Washington, D.C. 20530

National Labor Relations Board
1717 Pennsylvania Avenue, N.W.
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U.S. Supreme Court
1 First Street, N.W.
Washington, D.C. 20543
*(Hand delivered: original and 40 copies)*

I declare under penalty of perjury that the foregoing is true and correct.

Executed this 24th day of October, 1983 at Santa Monica, California.

Kirk W. Harney
*(Original signed)*

# Opposition

Office-Supreme Court, U.S.
FILED
DEC 20 1983
ALEXANDER L. STEVAS,
CLERK

No. 83-678

# In the Supreme Court of the United States

OCTOBER TERM, 1983

JOSEPH MAGNIN COMPANY, INC., PETITIONER

*v.*

NATIONAL LABOR RELATIONS BOARD, ET AL.

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT*

## BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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## QUESTION PRESENTED

Whether the Board reasonably exercised its discretion in refusing to defer to an arbitration decision that awarded incomplete relief for the unfair labor practice found by the Board.

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# In the Supreme Court of the United States

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No. 83-678

JOSEPH MAGNIN COMPANY, INC., PETITIONER

*v.*

NATIONAL LABOR RELATIONS BOARD, ET AL.

---

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT*

---

## BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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### OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A13) is reported at 704 F.2d 1457. The decision and order of the National Labor Relations Board (Pet. App. C1-C34), including the decision of the administrative law judge, is reported at 257 N.L.R.B. 656.

### JURISDICTION

The judgment of the court of appeals was entered on May 3, 1983. A petition for rehearing was denied on July 27, 1983 (Pet. App. B1). The petition for a writ of certiorari was filed on October 24, 1983. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## STATUTE INVOLVED

Section 10(a) of the National Labor Relations Act, 29 U.S.C. 160(a), is reproduced at Pet. App. F1-F2. Section 10(c) of the Act, 29 U.S.C. 160(c), which is also relevant, provides in pertinent part:

> If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any * * * unfair labor practice, then the Board shall * * * issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this [Act] * * *.

## STATEMENT

1. Petitioner operates a chain of retail department stores, including six stores in San Francisco. Petitioner voluntarily recognized the Union[1] as bargaining representative of its sales and other employees at all of its San Francisco stores (Pet. App. C8, C10).[2] Petitioner's stores elsewhere in the

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[1]Department Store Employees Union, Local 1100, United Food and Commercial Workers International Union, AFL-CIO.

[2]The parties' collective bargaining agreement contains the following provisions (Pet. App. E3):

**Section 1. Recognition**

> The Union is recognized as the sole collective bargaining agent for all employees employed at the San Francisco stores and Central Office Building of JOSEPH MAGNIN except for executives as defined in Section 2 * * * and for the classifications listed in Appendix A.

**Section 3. Union Membership**

> A. There shall be no discrimination by the Employer against any employee or applicant on account of membership in or activity on behalf of the Union.

Bay Area, but outside San Francisco city limits, have remained unorganized. In 1977, petitioner opened its Embarcadero store in San Francisco without extending recognition to the Union[3] and instituted a policy prohibiting the transfer of hourly employees between stores except in the case of employee relocations and promotions (*id.* at C11, C13, C22). Petitioner refused to allow employees at its unionized stores to transfer to Embarcadero; however, it did allow transfers from nonunion locations, claiming that each such transfer fell within an exception to the general policy (*id.* at C13-C14).

Prior to 1978, petitioner operated a Gucci department in its O'Farrell Street store (Store No. 1). In 1978 petitioner entered into an agreement with Gucci to open a freestanding Gucci shop on Post Street. Pet. App. C14. Petitioner planned to operate the new store as a nonunion store (*id.* at C4 & n.5); however, it did not inform the Union of its plans and in fact took steps to conceal the plans from the Union (*id.* at C14-C16). After the plans for the new Gucci store became public, the Union requested recognition as representative of the Post Street employees, but petitioner did not respond to the Union's request (*id.* at C27 n.9, E12). Petitioner informed employees who inquired that transfers would not be permitted, and an employee who attempted to transfer was told that her application was futile (*id.* at C17-C19). Petitioner informed employees that if they wanted to work at Post Street they would have to resign their current jobs, thereby losing accumulated seniority, and apply as new hires (*id.* at C16, C18, C19-C20).

In September 1978 an employee at Store No. 1 filed a grievance over the no-transfer rule. At a meeting held to discuss the grievance, petitioner stated that the Union's

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[3]The Union later won a Board-conducted election at the Embarcadero store (Pet. App. C10-C11).

contract would not apply and repeated that no hourly employees would be allowed to transfer to Post Street. The Union asserted a right to transfer under the contract and renewed its request for recognition. Pet. App. C15-C16, C27 n.9. The meeting ended in a deadlock, with the Union voting for, and petitioner voting against, proceeding to arbitration (*id.* at C16-C17).

The Union then formally requested arbitration pursuant to the contract; petitioner at first agreed to arbitrate but then refused. In January 1979 the Union sought and obtained a state court order compelling arbitration. Pet. App. C17 n.6, E2. Meanwhile, the Union filed unfair labor practice charges alleging that petitioner violated Section 8(a)(5) and (1) of the Act, 29 U.S.C. 158(a)(5) and (1), by refusing to allow employees in the Gucci department at Store No. 1 to transfer to Post Street in a "calculated attempt" to deny employees their rights under the contract and to impair their selection of the Union as their bargaining representative (Pet. App. E2).[4] The Board deferred proceedings on the charges pending completion of the arbitration (*ibid.*).

2. The arbitrator held that petitioner's no-transfer rule operated to preclude Gucci department employees at Store No. 1 from transferring to Post Street because of their union status, in violation of Section 3A of the collective bargaining agreement, and in circumstances in which it could "frustrate the intent and purpose of its obligations" to recognize the Union under Section 1 of the agreement (Pet. App. E30, E31). The arbitrator relied on evidence showing that "the company's announced policy of not permitting

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[4]The charges were later amended to allege also that petitioner refused to allow employees to transfer because of their union status, in violation of Section 8(a)(3) of the Act, 29 U.S.C. 158(a)(3)(Pet. App. C8).

transfers was either discriminatorily implemented or otherwise not *bona fide*," including evidence of discriminatory application and admissions by petitioner's officials that "the only reason for [the no-transfer rule] is because of the Gucci situation" and that the rule applied only to union stores (*id.* at E22, E30).

The arbitrator ordered petitioner to allow the transfer of Gucci department personnel from Store No. 1, but denied the Union's request that salespeople be made whole for commissions lost as a result of petitioner's refusal to transfer them to Post Street (Pet. App. E32-E33). The arbitrator found that nonunion Post Street employees had earned lower commissions than the Gucci salespeople at Store No. 1. The arbitrator added (*id.* at E33):

> The Union * * * suggests that because the Post Street store has been packed with an excessive number of nonunion employees, resulting in low average commissions, the figures should be adjusted. No evidence is provided or suggested, however, that would enable such an adjustment to be made. Accordingly, this requested relief is denied.

Following the arbitration award, petitioner refused to allow Store No. 1 employees to transfer until vacancies occurred at Post Street. In a letter clarifying his award the arbitrator ordered petitioner to allow transfers immediately, stating that "[o]therwise, the award would be essentially meaningless" (GCX 2(b), at 2).[5] Thereafter the Union filed a petition in state court for an order confirming the arbitration award, and petitioner filed a cross-petition in opposition. The court granted the Union's petition, and

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[5] "GCX" signifies the exhibits of the General Counsel before the Board. "Tr." signifies the transcript of proceedings before the Board.

petitioner appealed unsuccessfully. Petitioner's appeal was pending in California state court when the Board proceedings began in August 1980 (Pet. App. C17 n.6; Tr. 13-15).

3. The Union contended before the Board that its Section 8(a)(3) allegation of discrimination had been resolved by the arbitrator and that the Board should defer to that determination under *Spielberg Manufacturing Co.*, 112 N.L.R.B. 1080 (1955). Petitioner consistently opposed deferral to the arbitrator's finding until the reconsideration stage of the Board proceedings. See Pet. App. C1 n.1.

The Board adopted the findings and conclusions of the administrative law judge (ALJ) as to liability. It found, consistent with the arbitrator's decision, but based on an independent consideration of the evidence, that petitioner violated Section 8(a)(3) and (1) of the Act by prohibiting the transfer of employees to Post Street based on their union status (Pet. App. C2). However, the Board declined to defer to the arbitral award because the arbitrator did not grant the back pay relief necessary to remedy the violation (*id.* at C1 n.1).[6] In structuring the remedy, the Board assumed (solely for the purpose of remedying the past illegal conduct) that in the absence of any unfair labor practices the Union would have represented a majority of the Post Street employees and the collective bargaining agreement would have applied, so that back pay due the transferees would be computed according to the contractual wage and benefit structure (*id.* at C5).[7] In addition, the Board expanded the

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[6]The Board adopted the ALJ's finding that the arbitrator "was not presented with sufficient evidence by the parties and therefore was unable to make findings of fact crucial to shaping the necessary remedy with regard to backpay" (Pet. App. C1 n.1, C6, C33).

[7]The Board expressly declined to order that petitioner apply the collective bargaining agreement in the future or that it recognize and bargain with the Union in the absence of a demonstration of majority support at the Post Street Store (Pet. App. C5 n.7).

transfer remedy adopted by the arbitrator and the ALJ to include all employees who were discouraged from applying for transfer, not simply those who applied and were rejected because of their union affiliation (*id.* at C4).

In explaining the need for the relief it ordered, the Board noted that petitioner had considered carefully the financial advantage of escaping its contractual obligations and preventing a union presence at its new facility and had deliberately and successfully embarked on such a course (Pet. App. C3-C4). The Board concluded (*id.* at C4) that it could not "sanction a party's attempt to avoid contractual obligations lawfully undertaken when the method of avoidance constitutes an independent unfair labor practice." The Board also stressed the importance of providing redress to injured parties and avoiding encouragement of more violations of the same nature (*ibid.*).

The Board denied petitioner's motion for reconsideration, which was based on, inter alia, the refusal to defer to the arbitrator's award (Pet. App. D1).

4. Before the court of appeals, petitioner contended that the Board should have deferred to the arbitrator's decision not to award back pay (Pet. App. A4). The court of appeals (Wallace, J., dissenting) affirmed the Board's decision not to defer to the arbitrator and enforced the Board's order (*id.* at A1-A13). The court noted that the Board did not alter the arbitrator's finding on liability, but merely supplemented the remedy, consistent with the Board's broad discretion in fashioning remedies to effectuate the policies of the Act (*id.* at A5, A9 n.2). The court held that "the Board is not required to defer to an arbitral award where the arbitrator's inability to make a determination on appropriate relief, in the Board's sound discretion, renders the award repugnant to the purpose and policies of the Act" (*id.* at A 5) (footnote omitted). Rejecting the position of the dissent, the court

further found that the Board had adequately indicated that this was the reason for its refusal to defer to the award (*id.* at A9 n.2).

## ARGUMENT

1. Petitioner contends vigorously (Pet. 7-11) that the Board's exercise of jurisdiction in this case interfered with the parties' private voluntary efforts to settle their dispute through arbitration. But petitioner spent more than four years opposing arbitration and enforcement of the arbitrator's decision, and it opposed deferral to the arbitrator's award at all stages of the Board proceedings until the Board ordered broader relief than the arbitrator had awarded. Petitioner is not now in a position to challenge the Board's partial departure from the arbitrator's decision, since its own conduct belies any commitment in this case "to private dispute resolution as a means of achieving industrial stability." *Schaefer* v. *NLRB*, No. 82-1971 (Oct. 31, 1983), slip op. 4 (O'Connor, J., dissenting from denial of certiorari). Moreover, there is no merit to petitioner's contention that, under settled principles, the Board should have deferred to the arbitral award in this case.

Section 10(a) of the Act, 29 U.S.C. 160(a), expressly provides that the Board's authority to prevent persons from engaging in unfair labor practices is not "affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise." See *NLRB* v. *Acme Industrial Co.*, 385 U.S. 432, 436-437 (1967). Although the Board may in its discretion elect to defer to arbitral processes, it is not compelled to do so when an unfair labor practice has been committed. See *NLRB* v. *Strong Roofing & Insulating Co.*, 393 U.S. 357, 360-362 (1969). When the Board does assert jurisdiction, its unfair labor practice decision takes precedence over arbitral awards that enforce private contract rights. As the Court stated in *Carey* v. *Westinghouse Electric Corp.*, 375 U.S. 261, 271-

272 (1964) (quoting *International Harvester Co.*, 138 N.L.R.B. 923, 925-926 (1962), enforced, 327 F.2d 784 (7th Cir.), cert. denied, 377 U.S. 1003 (1964)):

> "There is no question that the Board is not precluded from adjudicating unfair labor practice charges even though they might have been the subject of an arbitration proceeding and award. Section 10(a) of the Act expressly makes this plain, and the courts have uniformly so held. However, it is equally well established that the Board has considerable discretion to respect an arbitration award and decline to exercise its authority over alleged unfair labor practices if to do so will serve the fundamental aims of the Act." * * * Should the Board disagree with the arbiter * * * the Board's ruling would, of course, take precedence * * *.

The Board, in its discretion, has established a policy of deferring to an arbitral decision only if (1) the arbitrator's decision is not clearly repugnant to the purposes and policies of the Act; (2) the arbitration procedures are fair and regular; (3) the parties have previously agreed to be bound by the arbitrator's decision; and (4) the arbitrator has considered and decided the unfair labor practice issue presented to the Board. *Spielberg Manufacturing Co.*, 112 N.L.R.B. 1080, 1082 (1955); *Raytheon Co.*, 140 N.L.R.B. 883, 884-885 (1963), enforcement denied on other grounds, 326 F.2d 471 (1st Cir. 1964); *Suburban Motor Freight, Inc.*, 247 N.L.R.B. 146-147 (1980).

Contrary to petitioner's contention (Pet. 10-13), the Board has long held that an arbitrator's failure to award back pay for a proven violation of Section 8(a)(3) is repugnant to the purposes and policies of the Act.[8] That conclusion is reasonable and within the Board's authority under the Act. Under Section 10(c) of the Act the Board is empowered to provide complete relief for any unfair labor practice it finds and to restore the parties to the status quo ante that would have obtained but for that unfair labor practice. *Golden State Bottling Co.* v. *NLRB*, 414 U.S. 168, 188 (1973); *Phelps Dodge Corp.* v. *NLRB*, 313 U.S. 177, 188 (1941); *Hammermill Paper Co.*, 252 N.L.R.B. 1236 (1980), enforced, 658 F.2d 155 (3d Cir. 1981), cert. denied, No. 81-1438 (Apr. 18, 1983). Here the arbitrator found that petitioner had committed an unfair labor practice, but he failed to award back pay for the discriminatory refusal to transfer. The Board reasonably concluded that this omission resulted in less than complete relief for the violation and hence was inconsistent with the Board's established remedial policy.[9] See *Lodges 700, 743, 1746, Int'l Ass'n of*

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[8]See *Hammermill Paper Co.*, 252 N.L.R.B. 1236, 1236, 1241 (1980), enforced, 658 F.2d 155 (3d Cir. 1981), cert. denied, No. 81-1438 (Apr. 18, 1983); *Cessna Aircraft Co.*, 220 N.L.R.B. 873, 875 (1975); see also *Sea-Land Service, Inc.*, 240 N.L.R.B. 1146, 1147 n.4 (1979); *American Interstate Freight Lines*, 258 N.L.R.B. 1005, 1009 (1981).

Petitioner correctly points out (Pet. 14-15) that in *Triple A Machine Shop, Inc.*, 245 N.L.R.B. 136, 137-138 (1979), the Board relied on the arbitrator's failure to consider the statutory issue and make findings on credibility, as well as his failure to award complete relief, in concluding that deferral was inappropriate. But nothing in that decision indicates that the failure to grant complete relief alone would be insufficient to defeat deferral. Indeed, the Board's opinion in *Triple A Machine Shop* makes clear that it would not defer in such circumstances (*id.* at 138 n.7). See also *Stop & Shop Companies*, 259 N.L.R.B. 867, 872, 873 (1981).

[9]This is not a case in which incomplete relief is the result of a settlement agreement negotiated in good faith and reflecting mutual concessions by the parties. Contrast, *e.g.*, *Roadway Express, Inc.* v.

*Machinists* v. *NLRB*, 525 F.2d 237, 246 (2d Cir. 1975). In these circumstances, the Board was justified in viewing the arbitrator's failure to award back pay as repugnant to the purposes and policies of the Act and in awarding the remedy the arbitrator had declined to provide.[10]

2. Petitioner also contends (Pet. 14-17) that the Board failed adequately to explain its decision and that the court of appeals affirmed on a basis not relied on by the Board. Petitioner claims that the Board's sole explanation for its refusal to defer was that the arbitrator "was not presented with sufficient evidence by the parties" to determine back pay (Pet. App. C1 n.1). That contention lacks merit.

As the court of appeals found (Pet. App. A5, A9 n.2), the Board's decision sufficiently indicates that its determination not to defer was based on its conclusion that the

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*NLRB*, 647 F.2d 415, 426 (4th Cir. 1981); cf. *Schaefer* v. *NLRB*, 697 F.2d 558 (3d Cir. 1983), cert. denied, No. 82-1971 (Oct. 31, 1983).

[10]Contrary to petitioner's contention (Pet. 11-13), the court of appeals' decision in this case does not conflict with *NLRB* v. *Pincus Bros., Inc.-Maxwell*, 620 F.2d 367 (3d Cir. 1980). In *Pincus Bros.-Maxwell*, the court held only that where the *reasoning* underlying an arbitration decision is subject to two arguable interpretations, one permissible and one impermissible under the Act, the Board must defer to the arbitration decision. Subsequent decisions of the Third Circuit have confined that holding to cases in which an arbitrator decides both the contractual and unfair labor practice issues based on all the evidence relevant to both. *Hammermill Paper Co.* v. *NLRB*, 658 F.2d at 159-160; *NLRB* v. *General Warehouse Corp.*, 643 F.2d 965, 970 n.20 (3d Cir. 1981). In *General Warehouse*, the Third Circuit stated, in agreement with the Ninth Circuit, that it would review the Board's deferral decisions in light of the Board's own *Spielberg* standards and would not substitute its deferral criteria for those of the Board. 643 F.2d at 968 n.10; *Hawaiian Hauling Services, Ltd.* v. *NLRB*, 545 F.2d 674, 676 (9th Cir. 1976), cert. denied, 431 U.S. 965 (1977). *Pincus Bros.-Maxwell* thus has no application to a case like this one, in which the Board determines that an arbitrator's failure to provide an adequate remedy produces a result that is repugnant to the purpose and policies of the Act. See *NLRB* v. *Gould, Inc.*, 638 F.2d 159, 167 n.7 (10th Cir. 1980), cert. denied, 452 U.S. 930 (1981).

arbitrator's failure to award back pay for petitioner's discriminatory refusal to transfer was repugnant to the Board's longstanding policy of providing complete relief. The Board stated in its decision (*id.* at C4) that back pay based on the contractual wage and benefit structure was necessary to restore the status quo ante and that "failure to grant appropriate relief not only leaves injured parties without redress but also encourages more violations of the same nature." The Board also noted (*id.* at C1 n.1) that the arbitrator did not have sufficient evidence to determine the *amount* of back pay due; however, this observation was incidental to the Board's basic conclusion that the transferees were *entitled* to back pay as a matter of remedial policy under the Act. Indeed, the Board's decision to grant back pay was not based on additional evidence, but was instead based on its judgment that make-whole relief was required to remedy fully the unfair labor practice it had found.[11] As the court of appeals concluded (Pet. App. A9 n.2), the Board's decision is adequately based on the ground that "incomplete relief is repugnant to the purposes and policies of the Act." See *Shepard* v. *NLRB*, No. 81-1627 (Jan. 18, 1983), slip op. 5-6.

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[11]The Board generally does not consider the evidence required to make particular back pay calculations until the compliance stage of its proceedings. See *NLRB* v. *Deena Artware, Inc.*, 361 U.S. 398, 412 (1960). In accordance with this procedure, the Board in this case deferred the determination of the specific amounts of back pay due each transferee and, to facilitate computation of those amounts, ordered petitioner to preserve and make available to the Board or its agents all payroll and other relevant records (Pet. App. C6, C33).

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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DECEMBER 1983

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